TEST YOUR ETHICS IQ!

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PROFESSOR GRACE M. GIESEL is the Bernard Flexner Professor and Distinguished Teaching Professor at the University of Louisville Louis D. Brandeis School of Law. Professor Giesel teaches Contract Law, Professional Responsibility, and Contract Drafting. She holds a B.A. in Economics from Yale University and a J.D. from Emory University School of Law, where she graduated with distinction and as a member of the Order of the Coif. Professor Giesel is the Chair of the KBA Ethics Committee and is the author of many articles on professional responsibility and contracts topics. She is a member of the Louisville, Kentucky, and American Bar Associations.
1. Dwight has represented Lucille in small legal matters over many years. For example, Dwight recently assisted Lucille in drafting her will and assisted her years ago when she had a bit of a dispute with a neighbor over boundary lines. Lucille now has come to Dwight and stated that Dwight has always treated her well and life has been good to her, so she would like to do something nice for Dwight. Lucille says that she knows Dwight loves to hunt and that she would like to give him fifty acres she owns that is a perfect hunting spot.

Which of the following is best?

a. Dwight cannot ethically accept any gift from a client.

b. Dwight cannot ethically accept such a substantial gift.

c. Dwight can ethically accept such a gift even if he prepares the documentation for the transfer.

d. Dwight can ethically accept such a gift as long as he did not solicit it.

2. Jessica, a family law attorney, has a client, Kylie, with a personal injury claim. Jessica called her friend, Dylan, a personal injury attorney, and asked if he would be interested in representing Kylie in the matter. Jessica and Dylan decide that Dylan will handle the personal injury matter. Dylan will charge Kylie 25 percent of the recovery and will share 50 percent of that amount with Jessica, though Jessica knows nothing about personal injury litigation. Jessica agrees that she will be liable for Dylan’s mistakes.

Which of the following is best?

a. Dylan and Jessica may split the fee only in accordance with the share of the work each does.

b. Dylan and Jessica may split the fee because Jessica is agreeing to be responsible for Dylan’s malpractice.

c. Dylan and Jessica may split the fee if they tell Kylie about the plan.

d. Dylan and Jessica may split the fee if Kylie signs a document that tells her about the plan.

3. Steve represents Adrienne; Adrienne is charged with robbing the local Zippy Mart. During an early conference, Adrienne told Steve that she was at the UK-Alabama basketball game on the night of the robbery. After the meeting Steve checked on the game and discovered that the game occurred a week earlier than the robbery. Steve told Adrienne this the next time they spoke. Adrienne said that
in that case she was with her mother having dinner and watching a movie on the
evening of the robbery.

Which of the following is best?

a. Steve may not refuse to allow Adrienne to testify even if he knows that
   she will testify falsely.

b. Steve may not refuse to allow Adrienne to testify if he reasonably believes
   she will testify falsely.

c. Steve may refuse to allow Adrienne to testify about her alibi if, in the
   exercise of his professional judgment, Adrienne should not testify.

d. Steve may refuse to allow Adrienne to testify if Steve reasonably believes
   that Adrienne will not testify truthfully.

4. Tara is an in-house attorney with Transport, Inc., a trucking company.
   Management asked Tara to investigate whether its employees are using illegal
   drugs while on the clock. A disgruntled ex-employee has suggested that drivers
   and loading dock employees are using drugs. Tara has scheduled to meet
   individually with the drivers and loading dock workers to investigate the issue.
   Adrian is the first employee Tara interviews. Tara asks Adrian if he understands
   who Tara is. Adrian responds that Tara is the company’s lawyer and that he is
   glad to talk to her because he really needs advice about this matter.

Which of the following is best?

a. Tara must tell Adrian that Tara does not represent Adrian and that Adrian
   should consult his own counsel.

b. Tara would behave ethically by explaining that she represents the
   company and Adrian is an employee of the company so Tara is Adrian’s
   lawyer too.

c. Tara would behave ethically by pointing out that anything Adrian says
   would be protected by the attorney-client privilege.

d. Tara would behave ethically by asking Adrian about the matter.

5. Rachel spoke with Ann Attorney for thirty minutes by telephone. Rachel was
   speaking with Ann about whether Ann would represent Rachel in a divorce
   matter. Ultimately, Ann declined Rachel’s representation and now would like to
   represent Rachel’s husband, Charles, in the divorce matter.

Which of the following is best?

a. Ann may not represent Charles because Rachel, the adverse party, is a
   former client.

b. Ann may not represent Charles because Rachel was a prospective client.
c. Ann may represent Charles because she never represented Rachel.

d. Ann may represent Charles even if Rachel was a prospective client if Rachel did not share with Ann any information that could be significantly harmful to Rachel in the divorce matter.

6. Two years ago Ron Attorney represented John and John's solely owned business, a plumbing service company, in setting up the business and establishing good business practices regarding employment matters and financial issues. John's wife, Emma, has now asked Ron to represent her in a divorce action against John.

Which of the following is best?

a. Ron may represent Emma because the matters are not the same or substantially related.

b. Ron may represent Emma because John is no longer a client.

c. Ron may not represent Emma if it is likely that in representing John, John disclosed confidences to Ron which could be useful in representing Emma and detrimental to John.

d. Ron may not represent Emma because John is a current client.

7. Tony and Anton practice law in a partnership. Tony represents Dan in an employment matter against Dan’s former employer, Skinny Minnie’s Restaurant. Dan is also in the process of getting a divorce. A lawyer who specializes in such matters represents Dan in the divorce matter. Dan’s wife, Angela, has asked Tony’s partner, Anton, to represent her in the divorce.

Which of the following is best?

a. Tony can continue to represent Dan and Anton can represent Angela if Tony and Anton agree not to communicate with one another about the matters.

b. Tony can continue to represent Dan and Anton can represent Angela because Tony’s representation of Dan does not present a significant risk of materially limiting Anton’s representation of Angela, and Anton’s representation of Angela does not present a significant risk of materially limiting Tony’s representation of Dan.

c. Tony can continue to represent Dan and Anton can represent Angela if both Tony and Anton reasonably conclude that they can competently and diligently represent Dan and Angela in the respective matters, and Tony obtains Dan’s informed consent, confirmed in writing, while Anton obtains Angela’s informed consent, confirmed in writing.
d. Tony cannot represent Dan while Anton represents Angela because lawyers in a firm cannot sue a current client of any other lawyer in that firm.

8. Isaac represents Matt in a trademark infringement matter against Sarah. Isaac discovers, in the course of investigating the matter and before filing suit, that Matt has no basis for his claim and that, in fact, the claim is fraudulent. When Isaac confronts Matt, Matt tells Isaac that his claim is fraudulent but he thinks Sarah will eventually pay him to go away if he pushes the matter. Isaac withdraws from the representation. A few months later Isaac hears through the grapevine that Matt has engaged Alex, another lawyer, to represent him in the trademark infringement matter and that Alex has filed suit.

Which of the following is best?

a. Isaac may not disclose what he knows to the court or Alex because the information is confidential.

b. Isaac may not disclose what he knows to the court or Alex unless Sarah will suffer a reasonably certain substantial financial injury as a result of Matt’s fraudulent conduct.

c. Isaac may disclose what he knows to the court.

d. Isaac may disclose what he knows to Alex because Isaac cannot assist Matt in the fraud.

9. Nicole represents Daisy, an engineer, in a matter involving a non-compete provision in Daisy’s employment contract with a former employer. Daisy would like to pay Nicole for her services by giving her the right to 10 percent of the proceeds from the licensing of a patent she has. The licensing agreement does not exist yet for the creation of such proceeds, but Daisy believes that the deal is sure to occur and that the proceeds will be substantial.

Which of the following is best?

a. Nicole cannot ethically agree to this payment approach because the non-compete representation is a litigation matter.

b. Nicole cannot ethically agree to this payment approach unless she follows the requirements for a business transaction with a client (the transaction and terms must be fair, reasonable, fully disclosed in writing; advice in writing of the desirability of independent counsel advice and opportunity to obtain it; informed consent, in a writing signed by the client).

c. Nicole cannot ethically agree to this payment approach because it may result in no payment.

d. Nicole cannot ethically agree to this payment approach because the non-compete representation is unrelated to the patent.
10. Abby represents Penny in a product liability action in which Penny claims she was injured by a lawn mower manufactured by Corporation. Bob represents Corporation in the matter. Bob has presented Abby with a settlement proposal that provides a respectable sum to Penny only if Abby agrees to refrain from using information she discovered in the course of the matter about Corporation in future actions against Corporation on behalf of other clients.

Which of the following is best?

a. Abby would be acting ethically by agreeing to the proposal because Abby would be acting in the best interest of her client in securing the settlement for Penny.

b. Abby would not be acting ethically by agreeing to the proposal because the settlement proposal would be an impermissible restriction on Abby’s ability to practice law.

c. Bob would be acting ethically by proposing such a settlement to Abby regardless of whether Abby could accept it ethically.

d. Abby would be acting ethically by agreeing to the proposal because the target information would be protected by the attorney-client privilege and therefore Abby could not reveal it anyway.

11. Lew Lawyer terminated his relationship with Law Firm A, his former employer. On his first day at his new firm, Law Firm B, Lew called all the clients whose matters he had been working on in a significant way while employed by Law Firm A. Lew explained to the clients that he had moved from Law Firm A to Law Firm B, and that the clients had the right to determine whether they would stay with Law Firm A or move with Lew to Law Firm B.

Which of the following is best?

a. Lew has not acted ethically because Law Firm A should provide the notice to the clients.

b. Lew acted ethically in notifying the clients that he had moved but did not act ethically in telling them that they could choose to move with him.

c. Lew has not acted ethically because it is Law Firm A’s decision whether any notice needs to be given to clients.

d. Lew acted ethically.
I. QUESTION 1

SCR 3.130(1.8) Conflict of interest: current clients; specific rules

(c) A lawyer shall not solicit any substantial gift from a client, including a testamentary gift, or prepare on behalf of a client an instrument giving the lawyer or a person related to the lawyer any substantial gift unless the lawyer or other recipient of the gift is related to the client. For purposes of this paragraph, related persons include a spouse, child, grandchild, parent, grandparent or other relative or individual with whom the lawyer or the client maintains a close, familial relationship.

II. QUESTION 2

SCR 3.130(1.5) Fees

(c) A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by paragraph (d) or other law. Such a fee must meet the requirements of Rule 1.5(a). A contingent fee agreement shall be in a writing signed by the client and shall state the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal; litigation and other expenses to be deducted from the recovery; and whether such expenses are to be deducted before or after the contingent fee is calculated. The agreement must clearly notify the client of any expenses for which the client will be liable whether or not the client is the prevailing party. Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a written statement stating the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination.

(e) A division of a fee between lawyers who are not in the same firm may be made only if:

1. the division is in proportion to the services performed by each lawyer, or, each lawyer assumes joint responsibility for the representation;

2. the client agrees to the arrangement and the agreement is confirmed in writing; and

3. the total fee is reasonable.
III. QUESTION 3

SCR 3.130(3.3) Candor toward the tribunal

(a) A lawyer shall not knowingly:

(3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.

Comment 9 to SCR 3.130(3.3)

(9) Although paragraph (a)(3) only prohibits a lawyer from offering evidence the lawyer knows to be false, it permits the lawyer to refuse to offer testimony or other proof that the lawyer reasonably believes is false. Offering such proof may reflect adversely on the lawyer's ability to discriminate in the quality of evidence and thus impair the lawyer's effectiveness as an advocate. Because of the special protections historically provided criminal defendants, however, this Rule does not permit a lawyer to refuse to offer the testimony of such a client where the lawyer reasonably believes but does not know that the testimony will be false. Unless the lawyer knows the testimony will be false, the lawyer must honor the client's decision to testify. (emphasis added); see also Comment (7) ("The duties stated in paragraphs (a) and (b) apply to all lawyers, including defense counsel in criminal cases. In some jurisdictions, however, courts have required counsel to present the accused as a witness or to give a narrative statement if the accused so desires, even if counsel knows that the testimony or statement will be false. The obligation of the advocate under the Rules of Professional Conduct is subordinate to such requirements.").

IV. QUESTION 4

SCR 3.130(1.13) Organization as client

(a) A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.

(f) 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.

(g) A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of Rule 1.7. If the organization's consent to the dual representation is required by Rule 1.7, the consent shall be given by an appropriate official of the
organization other than the individual who is to be represented, or by the shareholders.

Comment 10 to SCR 3.130(1.13)

(10) There are times when the organization's interest may be or become adverse to those of one or more of its constituents. In such circumstances the lawyer should advise any constituent, whose interest the lawyer finds adverse to that of the organization of the conflict or potential conflict of interest, that the lawyer cannot represent such constituent, and that such person may wish to obtain independent representation. Care must be taken to assure that the individual understands that, when there is such adversity of interest, the lawyer for the organization cannot provide legal representation for that constituent individual, and that discussions between the lawyer for the organization and the individual may not be privileged.

SCR 3.130(4.3) Dealing with unrepresented person

In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the 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. The lawyer shall not give legal advice to an unrepresented person. The lawyer may suggest that the unrepresented person secure counsel.

V. QUESTION 5

SCR 3.130(1.18) Duties to prospective client

(a) A person who discusses with a lawyer the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client.

(b) Even when no client-lawyer relationship ensues, a lawyer who has had discussions with a prospective client shall not use or reveal information learned in the consultation, except as Rule 1.9 would permit with respect to information of a former client.

(c) A lawyer subject to paragraph (b) shall not represent a client with interests materially adverse to those of a prospective client in the same or a substantially related matter if the lawyer received information from the prospective client that could be significantly harmful to that person in the matter, except as provided in paragraph (d). If a lawyer is disqualified from representation under this paragraph, no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter, except as provided in paragraph (d).

(d) When the lawyer has received disqualifying information as defined in paragraph (c), representation is permissible if:
(1) both the affected client and the prospective client have given informed
consent, confirmed in writing, or;

(2) the lawyer who received the information took reasonable measures to
avoid exposure to more disqualifying information than was reasonably
necessary to determine whether to represent the prospective client; and

(i) the disqualified lawyer is timely screened from any participation
in the matter and is apportioned no part of the fee therefrom; and

(ii) written notice is promptly given to the prospective client.

See also In re Marriage of Perry, 293 P.3d 170 (Mont. 2013) (holding that
although the wife spoke with attorneys three times, the attorneys were not
disqualified because wife told attorneys nothing significantly harmful).

VI. QUESTION 6

SCR 3.130(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 information relating to the representation to the disadvantage of
the former client except as these Rules would permit or require with
respect to a client, or when the information has become generally known;
or

(2) reveal information relating to the representation except as these Rules
would permit or require with respect to a client.

Comment 3 to SCR 3.130(1.9)

(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 business person 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.

VII. QUESTION 7

SCR 3.130(1.7) Conflict of interest: current clients

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

(1) the representation of one client will be directly adverse to another client; or

(2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

(b) Notwithstanding paragraph (a), a lawyer may represent a client if:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law;

(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
(4) each affected client gives informed consent, confirmed in writing. The consultation shall include an explanation of the implications of the common representation and the advantages and risks involved.

SCR 3.130(1.10) Imputation of conflicts of interest: general rule

(a) While lawyers are associated in a firm, none of them 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 the prohibition is based on a personal interest of the prohibited lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm.

VIII. QUESTION 8

SCR 3.130(3.3) Candor toward the tribunal

(b) A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.

SCR 3.130(1.6) Confidentiality of information

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

(1) to prevent reasonably certain death or substantial bodily harm;

(2) to secure legal advice about the lawyer's compliance with these Rules;

(3) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding, including a disciplinary proceeding, concerning the lawyer's representation of the client; or

(4) to comply with other law or a court order.
IX. QUESTION 9

SCR 3.130(1.8) Conflict of interest: current clients; specific rules

(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.

...  

(i) A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client, except that the lawyer may:

(1) acquire a lien authorized by law to secure the lawyer's fee or expenses; and

(2) contract with a client for a reasonable contingent fee in a civil case.

Comment 1 to SCR 3.130(1.8)

(1) . . . 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. 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.
X. QUESTION 10

SCR 3.130(5.6) Restrictions on right to practice

A lawyer shall not participate in offering or making:

. . .

(b) an agreement in which a restriction on the lawyer's right to practice is part of the settlement of a client controversy.


"Although a lawyer may participate in a settlement agreement that prohibits him from revealing information relating to the representation of his client, the lawyer may not participate or comply with a settlement agreement that would prevent him from using information gained during the representation in later representations against the opposing party, or a related party, except in limited circumstances. An agreement not to use information learned during the representation effectively would restrict the lawyer's right to practice and hence would violate Rule 5.6(b)."

XI. QUESTION 11

SCR 3.130(1.4) Communication

(a) A lawyer shall:

(1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(e), is required by these Rules;

(2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;

(3) keep the client reasonably informed about the status of the matter;

(4) promptly comply with reasonable requests for information; and

(5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

Comment 4 to SCR 3.130(1.16)

A client has a right to discharge a lawyer at any time, with or without cause, subject to liability for payment for the lawyer's services. Where future dispute
about the withdrawal may be anticipated, it may be advisable to prepare a written statement reciting the circumstances.

**Kentucky Bar Association E-424 (March 2005)**

**Subject:** Departure from a Law Firm

**Question I.A.** When a lawyer terminates his or her relationship with a private law firm, must the departing lawyer, or the firm, communicate with current clients regarding the departure?

**Answer:** Yes. See discussion below.

**Question I.B.** When a lawyer terminates his or her relationship with a private law firm, may the departing lawyer communicate with individuals other than current clients, including former clients and "firm" clients, regarding the departure?

**Answer:** Qualified Yes. See discussion below.

**Question II.** When a lawyer terminates his or her relationship with a private law firm to continue in private practice, may the departing lawyer take the files of current clients whom the departing lawyer is representing?

**Answer:** Qualified Yes. See discussion below.


**Opinion**

Traditions within the legal community have changed dramatically over the last fifty years and lawyers no longer join firms with the expectation that they will remain with the same firm for their entire career. The lateral movement of lawyers, from one practice to another, presents a number of ethical and legal issues to be considered by both the departing lawyer and those who remain behind. There are essentially three types of ethical issues to be addressed in these situations. One relates to the duties owed to current client by both the departing lawyer and the private law firm. These include the duty to communicate and keep the client informed and to otherwise protect the client's interests. Another issue relates to the propriety of the departing lawyer communicating with the public (including former and firm clients) about his or her changed affiliation and availability. Finally, there are issues related to the possession of client files.

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1 This opinion is limited to ethical issues arising when a private practitioner terminates his or her relationship with a private law firm. Although the issues facing departing government and entity lawyers are not addressed, it is noted that all lawyers, irrespective of where they work, have a responsibility to protect the interests of their clients upon terminations of the relationship. See SCR 3.130-1.16(d).
While this opinion focuses on a lawyer's ethical duty to a client and communication with the public, the Committee acknowledges that there is an equally important set of issues relating to the economic and legal relationship between the departing lawyer and the former law firm. There may be questions as to the allocation of fees, the notice the departing lawyer must give to the firm, and entitlement to various firm assets. Lawyers who practice together have fiduciary responsibilities to one another and they have the duty to conduct themselves ethically, keeping in mind the mandates of RPC 8.3 (prohibiting conduct involving dishonesty, fraud, deceit or misrepresentation) and 5.6 (prohibiting restrictions of the right to practice law). Much has been written about lawyers' duties to one another, both from an ethical standpoint and from a legal perspective. (See, e.g., Robert W. Hillman, Hillman on Lawyer Mobility – The Law and Ethics of Partner Withdrawals and Law Firm Breakups (2d ed. 1998); Robert W. Hillman, "Loyalty in the Firm: A Statement of General Principles on the Duties of Partners Withdrawing from Law Firms," 55 Wash. & Lee L. Rev. 997 (1998)). Although these economic and fairness issues are significant, they are primarily legal questions beyond this committee's authority and are not addressed in this opinion.

I. Communicating with Clients

Although Questions I.A. and I.B. both relate to communication about the lawyer's departure, they approach the issue from very different perspectives. Question I.A. asks whether a departing lawyer or the firm must communicate with current clients regarding the departure. Although the question is phrased in terms of communication, the underlying issue relates to both communication and continued representation.

When a lawyer leaves a firm, the relationship between the parties will change, but both the departing lawyer and the firm must take reasonable steps to ensure that client interests are protected and that the requirements of RPC 1.16 are satisfied. To that end, each client for whom the departing lawyer currently is

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2 At the time of a break-up, it is very likely that the departing lawyer will view certain current clients as "his," and the firm will regard the same clients as "firm clients." Irrespective of how the departing lawyer or the firm views a particular client, the client is not property and does not "belong" to anyone.

3 The inquiry assumes that there is a legal relationship between the departing lawyer and the firm – i.e., the departing lawyer is a part of the organization as an employee, partner, shareholder, member or the like. Lawyers who merely share office space do not normally have the same duties as those described in this opinion. Obviously office sharers need to keep their clients informed of the office location, but there is no choice to be made by the client when office sharers part ways because, unlike the firm, office sharers do not have responsibilities for the clients of one another. If, however, office sharers give the appearance of a firm, then the same duties described above may apply. See SCR 3.130-1.10, Comment [1]. But see, KBA E-396 (1997) and KBA E-311 (1986) describing the ethical problems of such associations.

4 SCR 3.130-1.16(d) provides "(u)pon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect the client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee that has not
responsible, or for whom the lawyer plays a significant role in the firm's delivery of services, must be notified of the departure and of the client's right to determine who will represent him or her in the future. (This is not to suggest that notice must be given to every client for whom a departing lawyer has done any work. Where the departing lawyer's connection with a client is so limited that the client will not be affected by the departure – for example where the departing lawyer's only involvement with a client was to undertake some research at the request of a supervising lawyer – no notice is required).

This duty to notify the client arises from the lawyer's duty to keep the client reasonably informed under SCR 3.130-1.4 and the client's right to counsel of his or her own choosing, as reflected in SCR 3.130-1.16 and 5.6. Not only will the departing lawyer have an obligation to make sure that the client is informed about the change, but those who remain with the firm may have obligations as well. As noted by ABA Formal Opinion 99-414 (1999), "[F]irm members remaining, and especially those with supervisory responsibility, have an obligation under the Rules of Professional Conduct, and may have obligations as well under other law, to assure to the extent reasonably practicable that the withdrawal from the firm is accomplished without material adverse effect on any client's interests...." Recognizing this joint responsibility, the ABA Formal Opinion states that notice may come from the departing lawyer, from the firm, or from both. The Committee agrees with the ABA that joint notice is preferable, but recognizes that this is not been earned." See also, Barbara Rea, "Breaking Up is Hard to Do," Ky. Bench & Bar 36 (Spring 1996) on the lawyer's responsibility upon termination of the relationship with the client.

SCR 3.130-1.4 provides:

(a) A lawyer should keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.

(b) A lawyer should explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

SCR 3.130-1.16, Comment [4], provides, in part, "[a] client has a right to discharge a lawyer any time, with or without cause, subject to liability for payment of the lawyer's services."

See SCR 3.130-5.6, Comment [1] expressing the view that one of the policy reasons that the rules prohibit restrictions on the right to practice law (non-competes) is that it "limits the freedom of clients to choose a lawyer."

SCR 3.130-5.1, which provides, in part:

(a) A partner in a lawyer 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.

(b) A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct.

(c) A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct.

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always practical. The critical point is that the client receives notice from someone associated with the firm and that the notice impartially and fairly provides the information necessary for the client to make an informed decision about future representation.

The Committee has reviewed a number of ethics opinions from other jurisdictions on the subject of the notice's content and method of communication and concluded that the following principles should be followed where notice to current clients is required:

- Notice may be given in-person or in writing. Although in-person communication with current clients is not prohibited under RPC 7.09(1), the Committee believes that all parties will be better served by written notice.  

- Communication should not urge the client to terminate his or her relationship with the firm, but may indicate the departing lawyer's willingness and ability to continue to represent the client.

- Communication must clearly state that the client has the right to decide who shall represent him or her in the future – this includes the firm, the departing lawyer or another lawyer.

- All communication with clients (whether initiated by the departing lawyer or the firm) should be respectful of the rights and professional abilities of all concerned and should not be disparaging in any way.

ABA Formal Opinion 99-414 concludes by noting that a lawyer does not necessarily violate the Rules of Professional Conduct by advising current clients of the departure, even before giving notice to the firm. Nevertheless, it reminds lawyers that such pre-notification communications may violate the lawyer's fiduciary duties or other legal responsibilities to the firm and expose the lawyer to potential civil liability. The Opinion emphasizes that "[b]efore preparing to leave one firm for another, the departing lawyer should inform herself of applicable law other than the Model Rules, including the law of fiduciaries, property and unfair competition. She also should take care to act lawfully in taking or utilizing the firm's information or other property." The Committee concurs in those cautions

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10 Pennsylvania Bar Association Committee on Legal Ethics and Professional Responsibility Opinion 99-100 (1999) acknowledges the that there is no prohibition against in-person contact with existing clients, but the Committee notes that written communications will provide a record of such communications, presumably so there is no basis for dispute as to what the client was told regarding the departure.

11 The departing lawyer must be careful to avoid conflicts of interest occasioned by his or her new affiliation. See, SCR 3.130-1.10.

and strongly encourages departing lawyers to notify the firm before notifying clients.

The above discussion relates to communications between the departing lawyer, or the firm, and current clients. Question I.B. raises issues with regard to communications with former clients (those for whom the departing lawyer has done significant work in the past), firm clients (those who have been or are represented by other lawyers in the firm, but for whom the departing lawyer has done no work) and others. The duty to communicate under RPC 1.4 would, by its terms, appear to apply only to current clients. Thus a departing lawyer has no obligation to communicate about his or her departure with former clients or with firm clients. On the other hand, the departing lawyer may wish to advise former clients, as well as firm clients with whom the lawyer has had no association and others, of the change in affiliation. In such a case the lawyer must consult Kentucky's advertising rules, contained in SCR 3.130-7.01-7.50 and SCR 3.130-8.3 (misconduct). Of particular applicability is SCR 3.130-7.09 (direct contact with prospective clients); SCR 3.130-7.15 (communications concerning a lawyer's services); SCR 3.130-7.20 (advertising); and SCR 3.130-8.3 (misconduct).

II. Retention of Client Files

One of the most difficult questions in any departure relates to the possession of client files – may the departing lawyer take the files to the new firm or does the former firm have the right to retain the files? As a general rule, client files and property must be handled in accordance with the client's wishes and this is a matter that should be addressed in conjunction with the client's decision regarding future representation. SCR 3.130-1.16(d), dealing with termination of representation, provides in part that "[u]pon termination of the representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as ... surrendering papers and property to which the client is entitled . . . ." (See KBA E-395 (1997) and KBA E-235 (1980) for examples of items that must be returned to the client). Thus, if the client effectively terminates his or her relationship with the former firm and elects to be represented by the departing lawyer, the departing lawyer may take the client's active file to the new firm. Likewise, where the client elects to remain with the former firm, the firm is entitled to keep the file.

In order to protect the client, the departing lawyer and the firm, the removal of any files from the firm should be authorized by the client in writing. The fact that the departing lawyer may have authority to remove a file, because the client has authorized it, does not mean that the firm has no interest in it. Likewise, the departing lawyer may have an interest in the file where the client has elected to be represented by the firm. Irrespective of who is entitled to the original file, the other may have a legitimate interest in its content, because, among other reasons, it would be essential in defending a later malpractice action. To safeguard all of these interests, the departing lawyer should not remove files without giving notice to the firm. This will assist in an orderly transition, permit the firm or the departing lawyer to make copies and ensure that the removal is

properly documented. Moreover, all lawyers must take care to ensure that confidential information is protected as required by SCR 3.130-1.6 and 1.9.

One final issue may arise with respect to client files. Where the client elects to follow the departing lawyer in his or her continued private practice, the former firm might assert that it is entitled to retain "the file" until such time as it has been paid for services previously rendered. Although the client has the unfettered right to terminate the relationship with the former firm, he or she is still liable for payment for past services. See, SCR 3.130-1.16 Comment [4]. This does not mean, however, that the former firm may hold the client's file hostage. Comment [9] to SCR 3.130-1.16 provides that a "lawyer may retain papers as security for a fee only to the extent permitted by law." In KBA E-395 (1997), this Committee noted that although Kentucky law provided for "charging liens" (a lien on funds or property recovered), there was no similar provision for an attorney to assert a "retaining lien." The Committee went on to note that even in those states where the assertion of a retaining lien is legal, there may be ethical limits on its exercise, citing ABA Annotated Model Rules pp 257-58. It concluded that "[w]hile the lawyer is entitled to reimbursement for costs incurred . . . the lawyer should 'surrender' the file even if reimbursement is not forthcoming." The one exception noted in KBA E-395 relates to "work product." Where a client has not paid the former firm for specific work, the firm is entitled to retain that work product for which it has not been paid. All other materials in the file must be provided to the client or his or her lawyer upon termination.

Both Question I and Question II frequently involve conflicts between departing lawyers and their former firm – both are trying to retain lucrative clients, maintain financial stability and protect their professional reputations. Although such conflicts may be unavoidable, all lawyers involved must remember that their primary obligation is to the client and that each has a duty to protect the client's interest.