ETHICS JEOPARDY!

Atlas IP Inn
Multibuzz.app Room ID: JTDZPZ

by Eric Curts
ericcurts@gmail.com - www.ericcurts.com
twitter.com/ericcurts - plus.google.com/+EricCurts1

ETHICS JEOPARDY

FINAL JEOPARDY

Texas Disciplinary Rules	USPTO	Conflicts of Interest/Attorney as Witness	Metaverse & Social Media	Cybersecurity / Remote Work	Fee Arrangements

Team 1	Team 2	Team 3	Team 4	Team 5	Team 6	Team 7	Team 8	Team 9	Team 10
0	0	0	0	0	0	0	0	0	0
- +	- +	- +	- +	- +	- +	- +	- +	- +	- +

Reset Scores

Texas Disciplinary Rules - $100 Question

Rob Blegoyo, a lawyer as well as an amateur politician and salesman, has a penchant for toeing the line between black and white. Recently, Rob has received several reprimands for selling client confidential information, among other things. Which must Rob report to the chief disciplinary counsel within 30 days?

A. A reprimand from his local peers;

B. A reprimand from a federal court or agency;

C. A letter of warning from a federal court or agency;

D. All of the above.

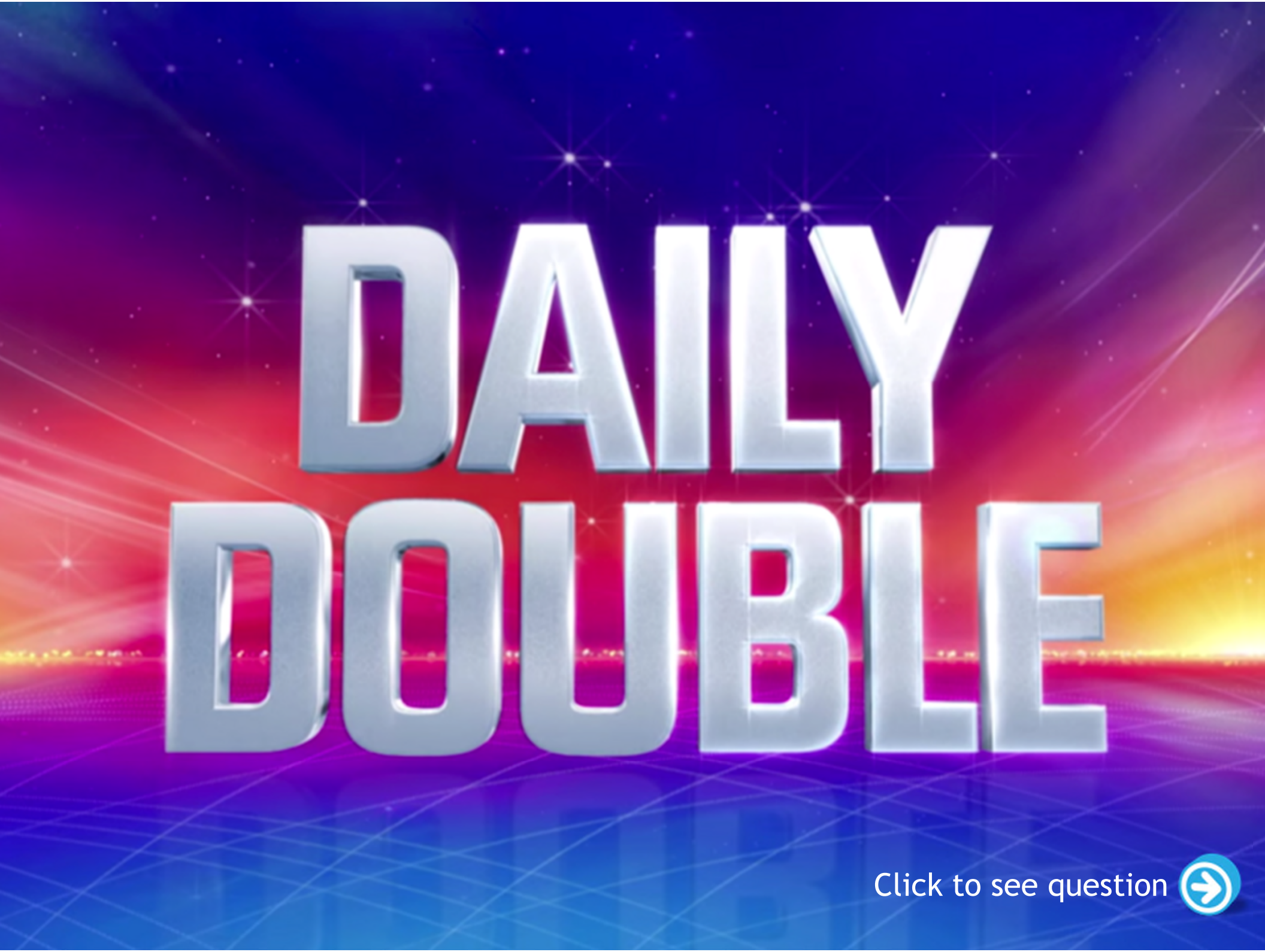
Click to see answer 

Texas Disciplinary Rules - $100 Answer

Answer: (B)

A lawyer who has been disciplined by the attorney-regulatory agency of another jurisdiction, or by a federal court or federal agency, must notify the chief disciplinary counsel within 30 days of the date of the order or judgment. The notice must include a copy of the order or judgment. For purposes of this paragraph, “discipline” by a federal court or federal agency means a public reprimand, suspension, or disbarment; the term does not include a letter of “warning” or “admonishment” or a similar advisory by a federal court or federal agency.

Click to return to Jeopardy Board


DAILY
DOUBLE
Click to see question

Texas Disciplinary Rules - Daily Double Question

Rick Ross, also known as “Ricky Rulefollower”, is a lawyer who prides himself on being a stickler for rules. Recently, a client of Ricky’s, Suge Day, has sought legal counsel after succumbing to the guilt of former hit and run vehicular accident. Rick strongly disagrees with Suge’s actions. Based on these facts, to whom may Rick disclose this information?

A. The victim, so compensation can be sought;

B. Law enforcement, so that justice can be served;

C. Legal counsel, to ensure compliance with the Texas Disciplinary Rule of Professional Conduct;

D. All of the above.

Click to see answer 

Texas Disciplinary Rules - Daily Double Answer

Answer: (C)

Under Rule 1.05 of the Texas Disciplinary Rules of Professional Conduct, a lawyer may reveal confidential information to secure legal advice about the lawyer's compliance with the Rules.

Click to return to Jeopardy Board

Texas Disciplinary Rules - $300 Question

Jefferson Epstien, an inmate in the Texas Department of Criminal Justice as well as a longtime client of Giselle Maxunwell, has recently disclosed confidential information to Giselle. Giselle, concerned about the confidential information she has received, is considering disclosing the confidential information. Which confidential information can Giselle disclose under the Texas Disciplinary Rule of Professional Conduct?

A. Information Giselle believes is necessary to comply with a court order;
B. Information Giselle believes is necessary to prevent Jefferson from committing a criminal act;

C. Information Giselle believes is necessary to prevent Jefferson from dying by suicide;

D. All of the above.

Click to see answer 

Texas Disciplinary Rules - $300 Answer

Answer: (D)

While the Texas Disciplinary Rules of Professional Conduct previously allowed a lawyer to reveal confidential information necessary to (1) comply with a court order, as well as to (2) prevent commission of a criminal act, amended Rule 1.05(c)(10) now also allows a lawyer to disclose confidential information necessary to prevent a client from dying by suicide.

Click to return to Jeopardy Board

Texas Disciplinary Rules - $400 Question

Howard Hughes is a well-known, wealthy businessman that is a client of Firm X, which represents Mr. Hughes in his business matters. Lately, Mr. Hughes has become very reclusive and paranoid. Recently, Mr. Hughes was in a bad airplane crash and has been on heavy medication since. He is difficult if not impossible to reach and has stopped all communications. Mr. Hughes has no guardian or other appointed legal representative.

The lawyers at Firm X reasonably believe that Mr. Hughes: has diminished capacity, is at risk of harm unless action is taken, and cannot adequately act in his own interest. The lawyers for Firm X may:

A. As far as reasonably possible, maintain a normal client-lawyer relationship with the client.

B. Take reasonable action to secure the appointment of a guardian or other legal representative for, or seek other protective orders with respect to, a client whenever the lawyer reasonably believes that the client lacks legal competence and that such action should be taken to protect the client.

C. Terminate their relationship with the client.

D. None of the above.

Click to see answer 

Texas Disciplinary Rules - $400 Answer

Answer: (B)

The old rule requiring an attorney to take reasonable action to secure the appointment of a guardian or other legal representative for, or seek other protective orders with respect to, a client whenever the lawyer reasonably believes that the client lacks legal competence and that such action should be taken to protect the client has been removed. Instead, when a lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial, or other harm unless action is taken, and cannot adequately act in the client's own interest, the lawyer **may** take reasonably necessary protective action. Such action may include, but is not limited to, consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, attorney ad litem, amicus attorney, or conservator, or submitting an information letter to a court with jurisdiction to initiate guardianship proceedings for the client.

Click to return to Jeopardy Board

USPTO - $100 Question

Are communications between a patent agent and a client privileged in USPTO proceedings?

A.Yes

B.Yes, but only in IPRs

C.No

Click to see answer

USPTO - $100 Answer

Answer: (A) Yes

but only if the communications are reasonably necessary and incident to the scope of the patent agent's authority – usually only patent prosecution related matters

37 CFR § 42.57 Privilege for patent practitioners.

- **(a)** ***Privileged communications.*** A communication between a client and a USPTO patent practitioner or a foreign jurisdiction patent practitioner that is reasonably necessary and incident to the scope of the practitioner's authority shall receive the same protections of privilege under Federal law as if that communication were between a client and an attorney authorized to practice in the United States, including all limitations and exceptions.
- **(b)** ***Definitions.*** The term "USPTO patent practitioner" means a person who has fulfilled the requirements to practice patent matters before the United States Patent and Trademark Office under § 11.7 of this chapter. "Foreign jurisdiction patent practitioner" means a person who is authorized to provide legal advice on patent matters in a foreign jurisdiction, provided that the jurisdiction establishes professional qualifications and the practitioner satisfies them. For foreign jurisdiction practitioners, this rule applies regardless of whether that jurisdiction provides privilege or an equivalent under its laws.
- **(c)** ***Scope of coverage.*** USPTO patent practitioners and foreign jurisdiction patent practitioners shall receive the same treatment as attorneys on all issues affecting privilege or waiver, such as communications with employees or assistants of the practitioner and communications between multiple practitioners.

Click to return to Jeopardy Board

USPTO - $200 Question

The ABA Model Rules of Professional Conduct require legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation required. What additional competencies, if any, are required of USPTO practitioners by 37 CFR § 11.101?

A. Scientific knowledge.

B. Technical knowledge.

C. Both A and B.

D. Neither A nor B.

Click to see answer

USPTO - $200 Answer

Answer: (C) Both A and B

§ 11.101 Competence. A practitioner shall provide competent representation to a client. Competent representation requires the legal, scientific, and technical knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

Click to return to Jeopardy Board

USPTO - $300 Question

John discovered Company ABC is infringing his recently obtained patent. He hires Attorney Smith to bring a patent infringement lawsuit against Company ABC. John, however, spends all of his funding to develop his patented technology and becomes unable to pay Attorney Smith's fees. Attorney Smith offers to take a 51% ownership interest in John's patent in exchange for Attorney Smith's continued representation in the lawsuit against Company ABC. Does this violate the USPTO's rules regarding conflict of interest?

A. No

B. Yes

Click to see answer

USPTO - $300 Answer

Answer: (A) No

37 CFR § 11.108 Conflict of interest; Current clients; Specific rules. (i) A practitioner shall not acquire a proprietary interest in the cause of action, subject matter of litigation, or a proceeding before the Office which the practitioner is conducting for a client, except that the practitioner may, subject to the other provisions in this section: (1) Acquire a lien authorized by law to secure the practitioner's fee or expenses; (2) Contract with a client for a reasonable contingent fee in a civil case; and (3) In a patent case or a proceeding before the Office, take an interest in the patent or patent application as part or all of his or her fee.

Click to return to Jeopardy Board

USPTO - $400 Question

Assume that in an *inter partes* review proceeding, the USPTO director issues mandatory discovery, including "all communications with any named party relating to the filing, settlement, or potential termination of this proceeding."

Are the parties required to disclose Rule 408 communications in response to the Director's discovery requests?

A. Yes

B. No, but they must list the Rule 408 communications on a privilege log.

C. No, and they do not need to list the Rule 408 communications on a privilege log.

D. None of the above.

Click to see answer 

USPTO - $400 Answer

Answer: (A) Yes

- In *OpenSky Industries LLC et al. v. VLSI Technology LLC*, case number IPR2021-01064, before the Patent Trial and Appeal Board, Director Vidal ordered the parties to respond to her interrogatories, including one requiring disclosure of "all communications with any named party relating to the filing, settlement, or potential termination of this proceeding."
- OpenSky failed to do so, citing Rule 408
- Director Vidal concluded Rule 408 does not bar admission of settlement discussions for all purposes – only offered for the purpose of proving or disproving the validity or amount of a dispute claim
- Director Vidal sanctioned OpenSky by holding disputed facts as established against OpenSky
- Ultimately, Director Vidal found that OpenSky was using the IPR process to extract payment from Intel/VLSI without meaningfully pursuing unpatentability grounds
- "Using AIA post-grant proceedings, including the IPR process, for the sole purpose of extracting payment is an abuse of process warranting sanctions."
- Bonus content: OpenSky's other sanctionable conduct included: Despite being given the opportunity, OpenSky failed to offer a verifiable, legitimate basis for filing its IPR Petition, which was filed only after a district court awarded large monetary damages keyed to the subject '759 patent. And the Petition it filed was not generated by OpenSky, but was a copy of Intel's earlier petition, filed without engaging Intel's expert or confirming his opinions or willingness to participate. Further, after filing the Petition, OpenSky did not conduct itself in a manner consistent with the AIA's purpose of exploring patentability issues. OpenSky's post-institution activity was dominated by attempts to extract money from either Intel or VLSI instead of engaging with the patentability merits.

Click to return to Jeopardy Board

Conflicts of Interest - $100 Question

The Gizmo Company owns a family of patents and has engaged the firm of Barley and Bates to enforce them against multiple alleged infringers in different lawsuits. Barley and Bates has used the same team of lawyers in each lawsuit, and thus far has experienced relative success.

Barry Ister is a part of that team, and while at a different firm drafted and prosecuted the ‘000 patent that for the first time is being enforced and a newly filed lawsuit against defendant Matco.

What is the best option for Barley and Bates to prevent Barry’s disqualification from the litigation team because he is likely to be a witness?

A. Obtain informed consent from Gizmo and Matco.
B. Prove Barry’s disqualification would cause a substantial hardship to Gizmo.
C. Ask Matco’s attorneys agree to limit any questioning to the value of legal services.
D. Stipulate to any issues of fact concerning the ‘000 patent raised by Matco.

Conflicts of Interest - $100 Answer

Answer: (B)

Prove Barry's disqualification would cause a substantial hardship to Gizmo.

Rely on Barry's past work with Gizmo, familiarity with the technology, and weigh the fairness of any adverse effect versus harm to Gizmo.

Click to return to Jeopardy Board

Conflicts of Interest - $200 Question

Barry Ister is an attorney employed at the Kravitz Firm, which has been asked to defend Acme Corp. against allegations of patent infringement brought by Emca Incorporated. Barry was previously at Zitvark and Collins, the firm that handled preparation and prosecution of Emca's patents. Zitvark is a regional boutique having about 100 attorneys. It was known within Zitvark that the partner managing the Emca patent portfolio often failed to submit known relevant prior art to the U.S. Patent Office, and some of his client's patents have been subject to claims of inequitable conduct. Barry did not work on the Emca patents or under this partner.

Can Barry be subject to disqualification from defending Acme Corp. because he is likely to be a witness?

A. Yes because his testimony may be to a contested issue.

B. Not unless Acme can prove his disqualification would cause a substantial hardship.

C. Yes if Acme and Emca both give informed consent in writing.

D. Not if Acme/Kravitz can prove Barry will not be a necessary witness.

Conflicts of Interest- $200 Answer

Answer: (D)

Not if Acme/Kravitz can prove Barry will not be a necessary witness.

D is likely the best answer as the size of the Zitvark firm and its turnover makes it likely that other witnesses can be located to provide this testimony.

Click to return to Jeopardy Board

Conflicts of Interest - $300 Question

A law firm writes and publishes a newsletter on intellectual property issues for the benefit of its clients. A third-party, obtaining access to the published materials, collects some of them into a book and offers it for sale on Amazon.com. The firm, represented by attorneys who did not author any of the copyright-protected subject matter, sues the book seller for copyright infringement. Should the attorneys representing the firm be disqualified?

A. Yes, because even during pretrial proceedings, the attorney-advocates will not be able to exercise independent professional judgment.

B. No, because there is no reason to believe that substantial evidence will be offered in opposition to the firm witnesses' testimony.

C. No, if the attorney-advocates will not be witnesses in the case.

D. No, unless the case proceeds to trial.

Click to see answer 

Conflicts of Interest - $300 Answer

Answer: (D)

ABA Rule 3.7 allows representation "in trial" if another lawyer in an attorney's firm is likely to be called as a witness unless Rules 1.7 or 1.9 otherwise preclude representation.

Rule 1.7 is key. A conflict of interest under rule 1.7 exists where a lawyer has a direct financial stake in the outcome of the case, and where the testimony of her law partners is central to the controversy, and she represents those partners at trial.

See Freeborn & Peters v. Prof. Seminar Assocs., 1988 WL 8990 (N.D. Ill. Jan 26, 1988).

Click to return to Jeopardy Board

Conflicts of Interest - $400 Question

An attorney representing an independent record label is notified that one of the artists has signed with a new label, breaching their contract. The new label has released videos on YouTube, and singles on Apple Music, Spotify, and Amazon which include sound recordings that are contractually obligated exclusively to the client label. The client label asks the attorney to file DMCA take-down notices with YouTube, Apple Music, Spotify, and Amazon on its behalf. Without listening to the single or watching the video, the attorney submits the take-down notices on his letterhead to YouTube, Apple Music, Spotify, and Amazon declaring the works are unauthorized under penalty of perjury as required by Section 512(c). The new label files suit with a single claim under 17 U.S.C. s. 512(f) asking the court to find that the take-down notices were filed in bad-faith.

Will a motion to disqualify the independent record label's attorney as trial counsel succeed?

A. Yes, because the attorney is a necessary fact witness.

B. Yes, but only if the attorney's client counterclaimed for copyright infringement.

C. No, because even if called to testify the testimony of the attorney will not be adverse to his client.

D. No, because he submitted the DMCA notices merely as an agent of his client, and is not a fact witness.

Click to see answer

Conflicts of Interest- $400 Answer

Answer: (A)

17 U.S.C. s.512(c) requires the noticing *person* to state under penalty of perjury that the works are not authorized by the copyright holder, an authorized agent of the copyright holder, or law. Courts have interpreted "authorized by law" to require a consideration of whether fair use authorizes the exploitation of the work. The same courts have stated that whether a use is "fair" must be considered in good faith, even if the ultimate determination is subjective.

Under ABA Rule 3.7, an attorney may not act as an advocate in a trial in which he is likely a necessary witness, unless (1) the testimony relates to an uncontested issue; (2) the testimony relates to the nature and value of legal services rendered in the case; or (3) disqualification of the lawyer would work substantial hardship on the client. Here, the issue of whether the works were appropriately the subject of a takedown notice does not fit into any of the Rule 3.7 exceptions.

Moreover, the attorney's testimony will be directly adverse to his client, in violation of Rule 1.7(a)(1). The attorney will be required to testify that he did not form a good faith subjective belief that the video and singles were not authorized under the fair use factors before the submitting the take-down notices to the ISPs because he never watched or listened to them.

Click to return to Jeopardy Board

Metaverse & Social Media - $100 Question

Lawyer Aardvark is lead counsel in a high profile patent infringement matter that is approaching trial. Aardvark is sure that his zealous advocacy in this high-profile matter will make him attractive to potential clients. Lawyer Aardvark decides the best way to do this is a post on his social media accounts lambasting his opponents and their unreasonable positions in the litigation, maybe even pushing the boundaries a bit, but all is fair in love and war.

Lawyer Zebra is opposed to Aardvark in the upcoming trial and hears about the social media posting that, in her view, are likely to prejudice the jury against her client and happen to not be particularly true. Being the savvy lawyer, she is, Zebra makes her own social media post calling out what she sees as inaccurate claims in Aardvark's posting and stating her client is eagerly looking forward to their day in court.

Who has potentially violated the ethical rules here:

A. Both Aardvark and Zebra, for making an improper extrajudicial statement under Texas Rule 3.07(a)

B. Only Aardvark, for making an improper extrajudicial statement under Texas Rule 3.07(a)

C. Only Aardvark, for making an improper extrajudicial statement under Texas Rule 3.07(a), and for making a false statement under Texas Rule 4.01(a)

D. Neither of them

Metaverse & Social Media - $100 Answer

Answer: B

Texas Rule 3.07(a): In the course of representing a client, a lawyer shall not make an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the lawyer knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicatory proceeding. A lawyer shall not counsel or assist another person to make such a statement.

But Model Rule 3.6(c): Notwithstanding paragraph (a), a lawyer may make a statement that a reasonable lawyer would believe is required to protect a client from the substantial undue prejudicial effect of recent publicity not initiated by the lawyer or the lawyer's client. A statement made pursuant to this paragraph shall be limited to such information as is necessary to mitigate the recent adverse publicity.

Texas Rule 4.1: In the course of representing a client a lawyer shall not knowingly: (a) make a false statement of material fact or law to a third person; or (b) fail to disclose a material fact to a third person when disclosure is necessary to avoid making the lawyer a party to a criminal act or knowingly assisting a fraudulent act perpetrated by a client.

B is the best answer because we do not know that Aardvark made a false statement and Zebra's statements would not act to materially prejudice the adjudicatory proceeding because they, at most balanced Aardvarks statements. This comports with the addition of paragraph c to the model rule allowing for statements to counteract another party's extrajudicial statements.

Metaverse & Social Media - $200 Question

Attorney Matt Murdock is partner and co-owner of the firm Nelson & Murdock in Hells Kitchen, New York. Dr. Strange walks into his office with a great idea for a new immersive experience that he plans on calling "The Multiverse in the Metaverse" where blockchain, virtual reality, augmented reality, mobile and computer technologies are all used to create a virtual environment. Dr. Strange has begun development and production on hardware devices that will interact with a virtual environment, allowing users to travel to different "universes" within the virtual environment where they can create avatars and buy/sell various assets using non-fungible tokens (NFTs) using blockchain technology.

Dr. Strange admits that he doesn't know very many attorneys but says Attorney Murdock was recommended to him by his best friend Wong. Dr. Strange has a stack of cash and gold coins and wants to hire Attorney Murdock to handle all trademark and copyright registrations related to "The Multiverse in the Metaverse" experience.

Attorney Murdock's legal experience has been exclusively in the field of criminal defense, and while he has won many trials for his clients, none have been focused intellectual property related matters. However, his girlfriend, Jennifer Walters, has ten years of experience handling trademark and copyright cases. So, Attorney Murdock agrees to take on Dr. Strange as a client, with the intent to bring on Jennifer Walters as co-counsel on the case.

Is it permissible for Attorney Matt Murdock to represent Dr. Strange for all intellectual property matters under this scenario?

A. Yes.

B. No, because Jennifer Walters does not work at Nelson & Murdock, and therefore she cannot represent Dr. Strange.

C. Yes, as long as Jennifer Walters agrees to supervise the work of Matt Murdock.

D. Yes, as long as Matt Murdock explains to Dr. Strange that Ms. Walters is competent to handle IP issues and will work on the case, and Dr. Strange agrees.

E. Yes, as long as Matt Murdock doesn't tell Dr. Strange that he is bringing Jennifer Walters to work on the IP issues.

Metaverse & Social Media - $200 Answer

Answer: D

Texas Rule 1.01 Competent and Diligent Representation (a): A lawyer shall not accept or continue employment in a legal matter which the lawyer knows or should know is beyond the lawyer's competence, unless:

- (1) another lawyer who is competent to handle the matter is, with the prior informed consent of the client, associated in the matter; or
- (2) the advice or assistance of the lawyer is reasonably required in an emergency and the lawyer limits the advice and assistance to that which is reasonably necessary in the circumstances.

Matt Murdock does not have any experience in trademark or copyright matters, so if he worked on Dr. Strange's case alone, it would violate Texas Rule 1.01 because he knows or should know that accepting the case would go beyond his competency.

However, Matt Murdock does not violate Texas Rule 1.01 because he is bringing on another lawyer who is competent to handle the matter with the prior informed consent of the client. Under these facts, Jennifer Walters is an attorney who has extensive TM and © experience, therefore she is competent to handle Dr. Strange's IP matters. Even though she is competent, it is Matt Murdock's ethical duty to explain to Dr. Strange the arrangement and Dr. Strange must consent to Jennifer Walters representing him too. If Dr. Strange does not consent, then Matt Murdock cannot accept Dr. Strange as a client.

Click to return to Jeopardy Board

Metaverse & Social Media- $300 Question

Kim K is a newly licensed attorney. She decides to buy her own piece of virtual land and open a law office in the Metaverse. She focuses her practice on representing her client-avatars in trademark conflicts. Her virtual law firm only accepts cryptocurrency as payment from her clients.

Under Texas Rules, can Kim K ethically accept cryptocurrency in exchange for legal services?

A. No, she needs to accept traditional U.S. currency instead
B. No, since cryptocurrency can rapidly change in value, a client could be either underpaying or overpaying for Kim K's legal services
C. Yes, as long as she keeps cryptocurrency received by the firm in an account separate from her personal cryptocurrency accounts
D. Yes, what happens in the Metaverse stays in the Metaverse

Click to see answer 

Metaverse & Social Media- $300 Answer

Answer: C

The best answer is C. Texas Disciplinary Rule 1.14(a) states that lawyers shall hold ***funds and other property*** belonging to clients that are in a lawyer's possession in connection with a representation separately from the lawyer's own property. Such funds and property shall be kept in a separate trust or escrow account and "appropriately safeguarded."

Kim K must keep client crypto in a separate trust or escrow account from her personal currency. She must also ensure that the trust or escrow account is appropriately safeguarded. Complete records of the funds and property must also be maintained under the Rule.

Metaverse & Social Media- $400 Question

Lawyer P.H. has read about the benefits of marketing on "socials" and knows the key is to build followers with juicy content. P.H. has a famous client with a case that has been in the news. The facts are just too interesting and juicy for P.H. not to use them to gain followers. P.H. knows he can't share client's confidential information publicly, so he makes the following four posts in this order:

A. What if a hypothetical totally not real famous client of client of mine is involved in a case in the news, would you want to know the juicy details?
B. What if my client's wife was ready to divorce him if he didn't retire?
C. What if my client admitted that he neglected his children for his work?
D. What if the client's initials were T. B.?

If P.H. posts these things on his social media pages, which post crossed the ethical line?

Click to see answer

Metaverse & Social Media - $400 Answer

Answer: A

With statement A, P.H. has already used the confidential information of a client to the advantage of the lawyer in violation of **Texas Rule 1.05(b)(4): a lawyer shall not knowingly use privileged information of a client for the advantage of the lawyer, unless the client consents after consultation**. P.H. has used the existence of the client's confidential information to his advantage even without directly disclosing the information.

Further, P.H. has also created an appearance of a conflict of interest between the client's interests and the interests of the lawyer in violation of **Texas Rule 1.06(b)(2): a lawyer shall not represent a person if the representation of that person appears to be or become adversely limited by the lawyer's or law firm's own interest**.

With statement B, P.H. has also run afoul of Teas Rule 1.05(b)(1) by disclosing "confidential information" which includes anything relating to a client acquired by the lawyer during the representation. Couching this as a possible hypothetical does not avoid this ethical requirement. This is true even if the news has already reported Gisele's statements, this is still related to the client and acquired during the representation.

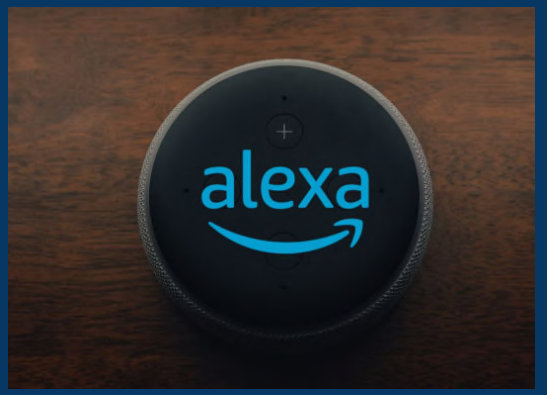
With statement C, P.H. has also run afoul of Teas Rule 1.05(b)(2) by using "confidential information" to the disadvantage of the client.

Statement D removes any doubt about these being about a "hypothetical" client.

Cybersecurity / Remote Work - $100 Question

Q: While working long hours from home, Susie barely has time to eat, never mind shop, and has grown tired of her family saying they are out of toilet paper. So, she set up an Amazon Alexa on her home office desk so that she can easily just shout out orders for household essentials while continuing to work. She has never thought to turn it off while on client calls.

Is this consistent with recent ABA Opinions?



A. Yes

B. No

C. The ABA Opinions are silent on this issue.

Cybersecurity / Remote Work - $100 Answer

Answer: B (No)

ABA Formal Opinion 498 (2021)

Provides additional guidance on remote, virtual lawyering, including by listing potential problems with such work.

5. Smart Speakers, Virtual Assistants, and Other Listening-Enabled Devices

Unless the technology is assisting the lawyer's law practice, the lawyer should disable the listening capability of devices or services such as smart speakers, virtual assistants, and other listening-enabled devices while communicating about client matters.

Otherwise, the lawyer is exposing the client's and other sensitive information to unnecessary and unauthorized third parties and increasing the risk of hacking.

Click to return to Jeopardy Board

Cybersecurity / Remote Work - $200 Question

Lawyers engaged in the outsourcing of substantive legal work must consider their ethical obligations to do which of the following?

A. Ensure competence and appropriate supervision;

B. Preserve the client's confidential information;

C. Check for conflicts of interest;

D. Disclose the outsourcing arrangement to the client;

E. Avoid assisting in the unauthorized practice of law.

F. All of the above

Click to see answer 

Cybersecurity / Remote Work - $200 Answer

Answer: F

Click to return to Jeopardy Board

Cybersecurity / Remote Work - $300 Question

Do Texas lawyers have a ethical duty to stay apprised of current cybersecurity risks involving the technology they use?

A. No, they just have duties to their clients.

B. No, although, in order to avoid being sued for a data breach, negligence, etc., they should.

C. No, although cybersecurity risks may implicate other ethical duties, such as the duty to not reveal confidential client information.

D. Yes, the Texas Rules of Disciplinary Conduct specifically impose such a duty.

Click to see answer 

Cybersecurity / Remote Work - $300 Answer

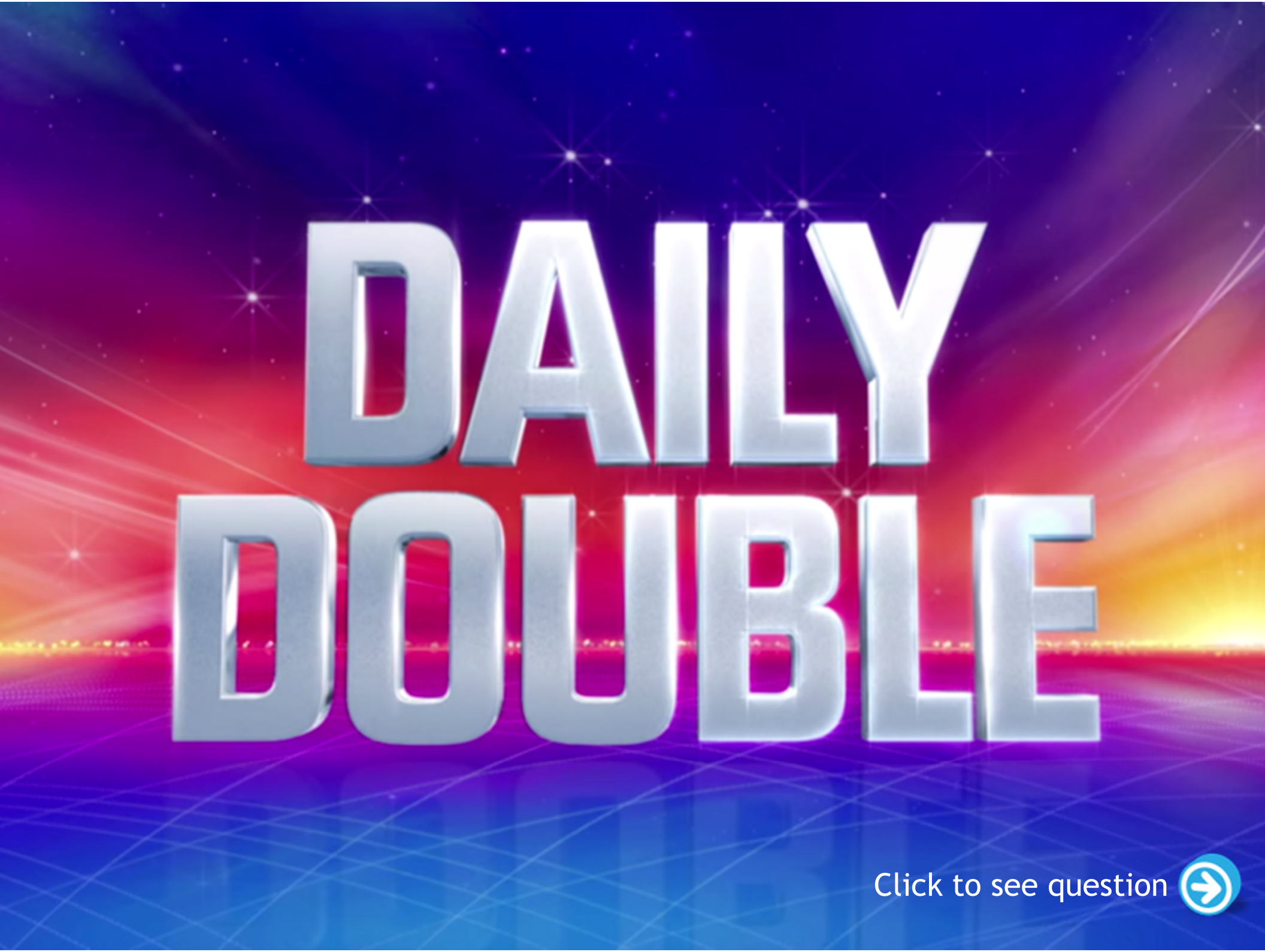
Answer: D (Yes, The TX Rules specifically impose such a duty)

TEX. DISCIPLINARY RULES OF PROF'L CONDUCT R. 1.01

- Competent and Diligent Representation
  - (a) A lawyer **shall not** accept or continue employment in a legal matter which the lawyer knows or should know is beyond the lawyer's **competence**, unless . . . .

- **Cmt. 8: Maintaining Competence**
  - Because of the vital role of lawyers in the legal process, each lawyer should strive to become and remain proficient and competent in the practice of law, ***including the benefits and risks associated with relevant technology***.

Click to return to Jeopardy Board


DAILY
DOUBLE
Click to see question

Cybersecurity / Remote Work - Daily Double Question

Bubba is an attorney admitted in Texas. He works at an IP boutique law firm in Houston. Bubba wishes to sell his home in Houston and live out the rest of his life at his vacation home in Rosemary Beach, Florida, which he purchased and frequented during the pandemic.

While living in FL, Bubba plans to continue working for his Texas firm by using his firm-issued laptop, connected to the firm's network. Despite physically working in Florida, he will not represent or solicit any Florida clients. Neither he nor the his Texas firm will provide him with a public presence or profile in Florida, nor will he represent to anyone that he is a Florida attorney. He will remain on the Texas firm's website, identified as affiliated with the firm, and all of his contact information will show him as practicing in Texas. Phone calls to his Texas number will automatically be forwarded to his Florida home office or his cell phone. As far as the world will know, he will remain a Texas lawyer.

Will Bubba be "practicing" in Texas where he is licensed but not physically located or is he practicing in Florida where he lives but is not licensed?

A. Yes, Texas
B. No, Florida
C. Both
D. Depends

Click to see answer

Cybersecurity / Remote Work - Daily Double Answer

Answer: A (Yes, Texas)

ABA Model Rules

- ABA Standing Committee on Ethics and Professional Responsibility issued Formal Opinion 495 (Dec. 16, 2020).
- Addressed lawyers working remotely under ABA Model Rule 5.5 ("Unauthorized Practice of Law; Multijurisdictional Practice of Law").
- **Conclusion**: as long as a lawyer's conduct is not considered to be unauthorized practice of law ("UPL") in the domiciled jurisdiction, remote practice from that jurisdiction is acceptable.
- **Reasoning**: The purpose of Model Rule 5.5 is "to protect the public from unlicensed and unqualified practitioners of law."
- "That purpose is not served by prohibiting a lawyer from practicing the law of a jurisdiction in which the lawyer is licensed, for clients with matters in that jurisdiction, if the lawyer is for all intents and purposes invisible as a lawyer to a local jurisdiction where the lawyer is physically located, but not licensed."

Answer continued. . .

Cybersecurity / Remote Work - Daily Double Answer Cont.

Texas

Tex. Prof. R. of Disc. Conduct 5.05 (Unauthorized Practice of Law):

•A lawyer shall not:

(a)practice law in a jurisdiction where doing so violates the regulation of the legal profession in that jurisdiction; or

(b)assist a person who is not a member of the bar in the performance of activity that constitutes the unauthorized practice of law.

Cmt. 5:

•Authority to engage in the practice of law conferred in any jurisdiction is not necessarily a grant of the right to practice elsewhere, and it is improper for a lawyer to engage in practice where doing so violates the regulation of the practice of law in that jurisdiction.

•However, the demands of business and the mobility of our society pose distinct problems in the regulation of the practice of law by individual states.

•In furtherance of the public interest, lawyers should discourage regulations that unreasonably impose territorial limitations upon the right of a lawyer to handle the legal affairs of a client or upon the opportunity of a client to obtain the services of a lawyer of his or her choice.

Answer continued. . .

Cybersecurity / Remote Work – Daily Double Answer Cont.

Tex. Prof. R. of Disc. Conduct 8.05 (Jurisdiction), cmt. 2:

- In modern practice lawyers licensed in Texas frequently act outside the territorial limits or judicial system of this state.
- In doing so, they remain subject to the governing authority of this state.
- **If their activity in another jurisdiction is substantial and continuous, it may constitute the practice of law in that jurisdiction.** See Rule 5.05.

Fee Arrangements - $100 Question

Patent Owner enters into an agreement with Funding Co. to pay its counsel's attorneys' fees for litigating its patent portfolio on a quarterly basis, in exchange for 20% of any of its recovery at trial. The agreement with the Patent Owner gives Funding Co. the rights to receive periodic updates on the progress of the litigation from Patent Owner's counsel, review and approve increases on counsel's budgets, and review counsel's invoices on a quarterly basis and make objections before disbursements of fees are made. Would this agreement be enforceable?

A. No, because Funding Co. is a third party and cannot be allowed to review invoices to a client or consult on trial strategy.

B. Maybe, if these rights of review and objecting to payment do not give Funding Co. control over the litigation.

C. Yes, because the law firm is ethically bound to follow its client's instructions and can decide to do so regardless of whether Funding Co. decides to disburse fees.

Click to see answer 

Fee Arrangements - $100 Answer

Answer: B.

Maybe, if these rights of review and objecting to payment do not give Funding Co. control over the litigation.

Generally, litigation funding agreements are not considered "champertous in nature" when the client maintains control over its claims and decisions about litigating those claims. *Anglo-Dutch Petroleum Intern., Inc. v. Haskell*, 193 S.W.3d 87 (Tex. App.--Hous. [1st Dist.] 2006). However, giving funders the right to control purse strings of the litigation can violate that principle, which can render such agreements unenforceable as conflicting with public policy. *See In re DesignLine Corp.*, 565 B.R. 341 (Bankr. W.D.N.C. 2017). This could also create ethical issues for attorneys who take on representations under such agreements, since they may compromise an attorney's ethical duties to their client.

Click to return to Jeopardy Board

Fee Arrangements - $200 Question

Patent attorney is prosecuting a U.S. patent application for an individual inventor who doesn't have enough cash flow to pay the attorney's fees. Would the patent attorney be able to take an ownership interest in or a royalty under any U.S. patent issuing from that patent application as a fee for the prosecution work?

A. Depends on the state you're in, and on whether you take an ownership interest or a royalty.

B. Yes, because the USPTO regulations expressly state that a patent attorney may do this.

C. No, because it creates a conflict of interest with the inventor.

Click to see answer 

Fee Arrangements - $200 Answer

Answer: A.

Depends on the state you're in, and on whether you take an ownership interest or a royalty.

37 C.F.R. 10.64 states that practitioners may take an interest in a patent as part of his or her fee for prosecuting the patent.* However, licensed attorneys will still be subject to state ethical rules. (Note: This is one way in which rules may be different for patent agents, since the latter would not be subject to state ethical rules governing attorneys.)

Some states such as NY and AZ have expressly allowed attorneys to take a partial ownership interest in a patent (assuming compliance with other ethical rules), but DC and some bar associations in California have found this arrangement to violate ethical rules. See AZ Bar Op. 94-15, NY Bar Comm. on Prof. Ethics, Op. No. 80-14; Legal Ethics Comm. of D.C. Bar Op. 195.

It may be safer for attorneys to calculate their fees based on a percentage of revenue that the client generates from the patent, which would likely be treated more like a traditional contingency fee arrangement.

Click to return to Jeopardy Board

Fee Arrangements - $300 Question

Patent Litigator A takes a case on contingency. The case takes an unexpected turn and now involves issues that A does not feel competent to handle. A would like to engage Patent Litigator B, at a different firm, to assist and share the fee. However, A would like to retain the majority of the fees while now performing the minority of the work because he has fostered the client relationship over many years. Can A ethically share fees with B, if the total fees are reasonable?

A. Yes, if the client agrees in a signed writing to the representation and fee sharing.

B. Maybe, it varies by state because the division of fees is not proportional to the services performed.

C. No, because the client is entitled to the lawyer of its choosing and it did not select B.

Click to see answer 

Fee Arrangements - $300 Answer

Answer: B.

Maybe, it varies by state because the division of fees is not proportional to the services performed.

Under ABA Model Rule 1.5(e), fees may be split among lawyers from different firms only if: (1) the fees are proportional to the services performed, (2) the client agrees to the arrangement, and (3) the total fee is reasonable. *See Levine v. Haralson, Miller, Pitt, Feldman & McAnally, P.L.C.*, 418 P.3d 1007 (Ariz. App. Div. 1, 2018). However, Texas RPC 1.04(f) additionally allows the lawyers assume "joint responsibility" rather than share fees based on the proportion of services in this situation. *See Cokinos, Bosien & Young v. Moore*, 2020 WL 549066, at *3 (Tex. App.—Dallas, 2020)

Click to return to Jeopardy Board

Fee Arrangements - $400 Question

Client disagrees with Attorney about the best course of action in a matter. Client subsequently fires Attorney and refuses to pay the last bill. Can Attorney retain some or all of the papers relating to the representation of Client?

A. Yes, Attorney may retain any papers relating to Client to the extent authorized by law if it will not prejudice Client.

B. Yes, Attorney has a right to claim a common law possessory lien against a client's property, money, and papers for the payment of amounts due the lawyer for services and expenses.

C. No, the case file, while in possession of Attorney, is the property of Client; therefore, Attorney may not withhold any portion of Client's file.

Click to see answer 

Fee Arrangements - $400 Answer

Answer: A.

Yes, Attorney may retain any papers relating to Client to the extent authorized by law if it will not prejudice Client.

While the "client's file belongs to the client", that does not end the analysis. *In re McCann*, 422 S.W.3d 701, 704 (Tex. Crim. App. 2013). Under ABA Model Rule 1.16(d) and the similar Texas RPC 1.15(d), upon termination of representation, a lawyer must surrender papers and property "to which the client is entitled," but may retain papers to the extent permitted by other law. Additionally, the lawyer must take steps to protect the client's interest. Therefore, even thought the lawyer "has a right to claim a common law possessory lien against a client's property, money and papers for the payment of amounts due," they must not prejudice the client. *Robins v. Commission for Lawyer Discipline*, 2020 WL 101921, at *14 (Tex. App.—Hous. [1st Dist.], 2020).

Click to return to Jeopardy Board

FINAL

JEOPARDY!

Topic: Conflicts of Interest

Final Jeopardy Question

An attorney worked at Sue, Grabbit, and Runne, LLP, which a court disqualified from representing a client in a case because one of the other lawyers at the firm had a conflict of interest regarding a former client, and this conflict was imputable to the entire firm. The firm was not timely in implementing screening measures and became subject to disqualification. The attorney was at the firm during this time but was not involved in the matter and did not learn any confidential information about the client. Eventually, the attorney left the firm and went to work at Hamlin, Hamlin, McGill, LLP. It turned out that the attorney's new firm is representing the client instead, after the attorney's previous firm was disqualified. The new firm has no measures in place to screen the attorney from participation in the matter, though the attorney is not in fact participating in the representation.

Will the new firm be subject to disqualification now, because the attorney joined from another firm that was subject to disqualification?

A. Yes, because the disqualification the attorney experienced at the old firm is imputable to the other lawyers in the new firm, without adequate screening measures in place.
B. Yes, unless adequate screening measures are put in place within a reasonable time by the new firm.
C. No, assuming the attorney receives no part of the fees received for the representation.
D. No, there is no doctrine of double-imputation that would impute a purely imputed conflict from the attorney onto the other lawyers in the new firm.

Final Jeopardy Answer

Answer: D (No, there is no doctrine of double-imputation that would impute a purely imputed conflict from the attorney onto the other lawyers in the new firm.)

Rule 1.10: Imputation of Conflicts of Interest: General Rule of the ABA's Model Rules of Professional Conduct requires that:

(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

(1) the prohibition is based on a personal interest of the disqualified lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm; or

(2) the prohibition is based upon Rule 1.9(a) or (b) and arises out of the disqualified lawyer's association with a prior firm, and

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

(ii) written notice is promptly given to any affected former client to enable the former client to ascertain compliance with the provisions of this Rule, which shall include a description of the screening procedures employed; a statement of the firm's and of the screened lawyer's compliance with these Rules; a statement that review may be available before a tribunal; and an agreement by the firm to respond promptly to any written inquiries or objections by the former client about the screening procedures; and

(iii) certifications of compliance with these Rules and with the screening procedures are provided to the former client by the screened lawyer and by a partner of the firm, at reasonable intervals upon the former client's written request and upon termination of the screening procedures.

(b) When a lawyer has terminated an association with a firm, the firm is not prohibited from thereafter representing a person with interests materially adverse to those of a client represented by the formerly associated lawyer and not currently represented by the firm, unless:

(1) the matter is the same or substantially related to that in which the formerly associated lawyer represented the client; and

(2) any lawyer remaining in the firm has information protected by Rules 1.6 and 1.9(c) that is material to the matter.

(c) A disqualification prescribed by this rule may be waived by the affected client under the conditions stated in Rule 1.7.

(d) The disqualification of lawyers associated in a firm with former or current government lawyers is governed by Rule 1.11.

There is no doctrine of double-imputation. Thus, the new firm will not be subject to disqualification now, because the attorney joined from another firm that was subject to disqualification.

Cybersecurity / Remote Work - $ Question

Do Texas lawyers have a ethical duty to stay apprised of current cybersecurity risks involving the technology they use?

A. No, they just have duties to their clients.

B. No, although, in order to avoid being sued for a data breach, negligence, etc., they should.

C. No, although cybersecurity risks may implicate other ethical duties, such as the duty to not reveal confidential client information.

D. Yes, the Texas Rules of Disciplinary Conduct specifically impose such a duty.

Click to see answer 

Cybersecurity / Remote Work - $ Answer

Answer: D (Yes, The TX Rules specifically impose such a duty)

TEX. DISCIPLINARY RULES OF PROF'L CONDUCT R. 1.01

- Competent and Diligent Representation
  - (a) A lawyer **shall not** accept or continue employment in a legal matter which the lawyer knows or should know is beyond the lawyer's **competence**, unless . . . .

- **Cmt. 8: Maintaining Competence**
  - Because of the vital role of lawyers in the legal process, each lawyer should strive to become and remain proficient and competent in the practice of law, ***including the benefits and risks associated with relevant technology***.

Conflicts of Interest - $100 Question

An attorney sued Large Company on behalf of a client for patent infringement. During the litigation that ensued, Conglomerate bought Large Company. The attorney was already representing Conglomerate in a separate product liability matter before a different federal court. Assuming this development was unforeseeable at the outset of representing Large Company, will the attorney have to withdraw from one of the representations to avoid the conflict?

A. Yes, but only if Conglomerate requests the attorney to do so.
B. Yes, but the attorney must seek court approval where necessary and take steps to minimize harm to the clients.
C. No, because the federal administrative proceeding is unrelated.
D. No, because the conflict arose after representation.

Click to see answer

Conflicts of Interest – $100 Answer

Answer: B (Yes, but the attorney must seek court approval where necessary and take steps to minimize harm to the clients.)

Rule 1.7: Conflict of Interest: Current Clients of the ABA's Model Rules of Professional Conduct requires that:

(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 the existence of a concurrent conflict of interest under 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.

Here, the representation of one client will be directly adverse to another client. Further, the representation **does** 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.

USPTO – $ Question

In what instance(s) may a USPTO practitioner reveal information relating to the representation of a client?

A. Never because doing so would violate the USPTO's duty of confidentiality.

B. To prevent the client from engaging in inequitable conduct before the USPTO.

C. To comply with the USPTO's duty of disclosure.

D. Both B and C.

USPTO- $ Answer

Answer: Both B and C.

§ 11.106 Confidentiality of information. (a) A practitioner 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, the disclosure is permitted by paragraph (b) of this section, or the disclosure is required by paragraph (c) of this section.

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

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

(2) To prevent the client from engaging in inequitable conduct before the Office or from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the practitioner's services;

(3) To prevent, mitigate, or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime, fraud, or inequitable conduct before the Office in furtherance of which the client has used the practitioner's services;

(4) To secure legal advice about the practitioner's compliance with the USPTO Rules of Professional Conduct;

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

(6) To comply with other law or a court order; or

(7) To detect and resolve conflicts of interest arising from the practitioner's change of employment or from changes in the composition or ownership of a firm, but only if the revealed information would not compromise the practitioner-client privilege or otherwise prejudice the client.

(c) A practitioner shall disclose to the Office information necessary to comply with applicable duty of disclosure provisions.

(d) A practitioner shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.

USPTO - $ Question

Which of the following is a proper signature for trademark prosecution filings?

A. A handwritten signature personally signed in permanent ink by the person named as the signatory

B. A true copy of a handwritten signature

C. An electronic signature that is personally entered, including any combination of letters, numbers, spaces and/or punctuation marks that the signer has adopted as a signature, placed between two forward slash (“/”) symbols in the signature block on the electronic submission; or

D. All of the above

USPTO- $ Answer

Answer: D

- 37 C.F.R. § 2.193 Trademark correspondence and signature requirements
  - – “(a)…Each piece of correspondence that requires a signature must bear:
  - • (1) A handwritten signature personally signed in permanent ink by the person named as the signatory, or a true copy thereof; or
  - • (2) An electronic signature that meets the requirements of paragraph (c) of this section, personally entered by the person named as the signatory….
  - * * * * *
  - – (c) Requirements for electronic signature. A person signing a document electronically must:
  - • (1) Personally enter any combination of letters, numbers, spaces and/or punctuation marks that the signer has adopted as a signature, placed between two forward slash (“/”) symbols in the signature block on the electronic submission; or
  - • (2) Sign the document using some other form of electronic signature specified by the Director.
  - * * * * *
  - – (f) Signature as certification. The presentation to the Office (whether by signing, filing, submitting, or later advocating) of any document by any person, whether a practitioner or non-practitioner, constitutes a certification under §11.18(b) of this chapter. **Violations of §11.18(b) of this chapter may jeopardize the validity of the application or registration, and may result in the imposition of sanctions under §11.18(c) of this chapter. Any practitioner violating §11.18(b) of this chapter may also be subject to disciplinary action.**