

Recent Legal Ethics Developments: You Make the Call

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Speaker



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Scenario #1 - Intermediaries

- You're an IP lawyer who has been retained by Milton Lynxley and his firm Lynxley Enterprises to assess the validity of an old patent issued to Milton's grandfather, Ebenezer Lynxley.
- Milton is wealthy, extremely busy, and hard to reach.



Scenario #1 – Intermediaries (cont.)



- In fact, most of the time, when you attempt to contact Milton, you end up speaking with either his son, Cattrick, or his daughter, Kitty, who appear, as best as you can tell, to work closely with their father and to assist with his business affairs.

Scenario #1 – Intermediaries (cont.)

- You do know that both Cattrick and Kitty are employed by Lynxley Enterprises.



Scenario #1 – Intermediaries



- Is it ethical for you to communicate with your clients through Cattrick and Kitty?

Scenario #1 – Intermediaries

- Yes – since Cattrick and Kitty work for Lynxley Enterprises, they are acceptable (though perhaps not ideal) intermediaries.
- No – you violated your duty to communicate with your clients under MRPC 1.4/WI SCR 20:1.4.

Scenario #1 – Intermediaries

- MRPC 1.4/WI SCR 20:1.4.

- (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 SCR 20:1.0(f), 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 by the client 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.

Scenario #1 – Intermediaries

- Examples of intermediaries:
 - Joint representations (client group)
 - Professional intermediary (agents, advisors, etc.)

Scenario #1 – Intermediaries

- Solutions:
 - Insist on direct communication
 - Send regular email status reports to all joint clients
 - Document agent's authority

Scenario #2 – Intermediaries (cont.)



- Now assume that, as part of your engagement, Milton explicitly authorized you to communicate through his other son, Pawbert.
- Pawbert wouldn't have been your first choice for an intermediary.
- He is a bit awkward and goofy. And he has expressed some interests or desires from time to time that might be at odds with those of his father and of Lynxley Enterprises.

Scenario #2 – Intermediaries (cont.)

- You've finished your analysis of the Lynxley patent for Milton and Lynxley Enterprises.
- You've found that the patent is invalid since it appears to be based entirely on the work of a prior patent granted to Agnes De'Snake.
- This conclusion could have significant legal and business consequences for Milton and his firm.



Scenario #2 – Intermediaries (cont.)



- Once again, it isn't easy to reach Milton.
- Is it a good idea for you to communicate your findings exclusively with Pawbert?
 - Yes, he is the authorized intermediary after all. This is what Milton told you to do.
 - No.

Scenario #2 – Intermediaries (cont.)



- There are too many risks.
- Three distinguishing factors for this scenario:
 - Pawbert is now an authorized intermediary. That helps.
 - But:
 - Critical advice should be communicated directly with the client.
 - Issues exist concerning Pawbert's loyalty to his father and Lynxley Enterprises. You need to consider whether your advice or instructions to you are being communicated faithfully to your actual client.

Scenario #3

- You represent the firm of Duke & Duke Commodities Brokers and its principals, Randolph and Mortimer Duke. During settlement discussions with the Division of Enforcement for the CFTC, you send an email to the Division's lawyers in which you offer to settle on behalf of your clients—for \$1.00. You copy Randolph and Mortimer on your email.



Scenario #3



	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV
4TH								
3RD		111	129	137	145	155	164	175
2ND		113	130	139	146	156	166	176
LAST		117	131	136	144	157	165	173
		122	133	141	147	155	166	175
OPEN	102	112	127	135	140	150	161	172
HIGH		122	133	141	147	157	169	177
LOW		110	125	134	140	149	158	167
SETT. PR.	98	112	129	134	142	156	165	170

- The CFTC lawyer uses “reply all” and responds to you, Randolph, and Mortimer: “No way. We can show that your clients attempted to corner the market in FCOJ futures. It’s time for them to pay up.”
- ***Has the CFTC lawyer violated the “no-contact” rule in MRPC 4.2?***

Scenario #3

- [yes] – MRPC 4.2 prohibits a lawyer from communicating with a represented person about the subject of the representation without consent.
- [no] – since Randolph and Mortimer were on the original email, they're fair game.

Scenario #3

- ABA Model Rule 4.2 – the “no-contact” or “anticonflict” rule
- ABA Formal Opinion 503 (Nov. 2, 2022)



Scenario #4 – Dual Roles/Contact with Represented Parties

- After a series of professional successes at Monsters, Inc., Mike Wazowski studies to become a lawyer and becomes the general counsel, in addition to acting as co-CEO of Monsters, Inc. with James Sullivan.

Scenario #4 – Dual Roles/Contact with Represented Parties



- As part of his duties as a co-CEO, Mike regularly meets with potential JV partners for business discussions regarding potential partnerships.

Scenario #4 – Dual Roles/Contact with Represented Parties

- The counterparties are often represented by counsel, but their counsel is rarely present for these introductory meetings.
- Mike's official title at Monsters, Inc. is "co-CEO and General Counsel."



Scenario #4 – Dual Roles/Contact with Represented Parties



- Is it ethical, under the Wisconsin ethics rules governing lawyers, for Mike to attend a meeting with a potential JV partner, even when he knows that the counterparties are represented by counsel and when their counsel is not present for the meeting?
 - Yes, provided that Mike takes certain steps to ensure that the potential partners know about his legal role
 - No, legal-ethics rules prohibit any lawyer from having contact with represented parties under these circumstances

Scenario #4 – Dual Roles/Contact with Represented Parties

- MRPC 4.2 / WI SCR 20:4.2
- Formal Opinions 502 and 503



Scenario #5 – Olaf Becomes a General Counsel

- Olaf has recently moved to Wisconsin—finding that the climate is more suitable to his health—and has become the GC of Kristoff's Ice Supply, Inc., one of the state's leading suppliers of ice harvested naturally from frozen lakes.



Scenario #5 – Olaf Becomes a General Counsel

- Olaf is a graduate of the Law School at the University of Arendelle (go Snowbears!) and is admitted to practice before the Arendelle bar.
- Arendelle is a common-law jurisdiction.



Scenario #5 – Olaf Becomes a General Counsel

- Olaf's move to Wisconsin, which was in September of this year, coincided with the start of the busy season for Kristoff's, and Olaf didn't have time to investigate whether he needed any approval from the Wisconsin State Bar before starting his new job at Kristoff's.



Scenario #5 – Olaf Becomes a General Counsel

- Olaf is out working with one of the crews on the lake one morning when he receives a voicemail from a Character and Fitness Investigator with the Wisconsin State Bar who asks him to return her call.



Scenario #5 – Olaf Becomes a General Counsel

- Uh oh.
- Has Olaf violated any Wisconsin ethical requirements?
 - Yes
 - No, since Olaf is licensed in Arendelle and received a common-law education, he can work in-house in Wisconsin



Scenario #5 – Olaf Becomes a General Counsel

- WI SCR 10.03(4)(f)

Scenario #6 – Olaf Becomes a General Counsel (cont.)

- Now assume that Olaf submits the paperwork required by SCR 10.03(4)(f) on today's date (12/12) after talking with the C&F investigator from the State Bar.



Scenario #6 – Olaf Becomes a General Counsel (cont.)



- Is Olaf now compliant with Wisconsin's requirements for the registration of in-house counsel?
 - Yes
 - No

Scenario #6 – Olaf Becomes a General Counsel (cont.)

- WI SCR 10.03(4)(f)
- ***“...shall register as in-house counsel within 60 days after the commencement of employment as a lawyer...”***

Scenario #7 – Olaf Becomes a General Counsel (cont.)

- Now assume that, before Olaf submitted his application to register as in-house counsel, he had several conversations with Kristoff that ordinarily would be considered attorney-client conversations and thus protected by the attorney-client privilege.



Scenario #7 – Olaf Becomes a General Counsel (cont.)



- Did Olaf's failure to register and to comply with SCR 10.03(4)(f) affect whether the conversations that he had with Kristoff were protected by the attorney-client privilege?
 - Yes – the privilege did not apply because Olaf was engaged in the unauthorized practice of law
 - No – the conversations were still protected by the privilege

Scenario #7 – Olaf Becomes a General Counsel (cont.)

- Wis. Stat. § 905.03

Scenario #8 – The Dishonest Deponent

- You represent Mr. Mayhem, a defendant in a car-accident case in Texas. He has confided to you before his deposition that his eyes were on his phone when the accident occurred. But he still maintains that the accident was not his fault.
- You advise Mr. Mayhem to testify honestly.



Scenario #8 – The Dishonest Deponent



- But, when asked during his deposition where he was looking at the time of the accident, Mr. Mayhem lies and testifies that he was not looking at his phone.
- During the next break, you privately direct Mr. Mayhem to correct his testimony, but he refuses and instructs you to stay quiet.

Scenario #8 – The Dishonest Deponent

- *If you follow Mr. Mayhem's instructions to remain quiet, are you assisting perjury?*



*"But that was a long time ago. The law west of the Pecos now
\$225.00 an hour."*

Scenario #8 – The Dishonest Deponent

- [Yes] – this has been settled since ABA Ethics Opinion 93-376 (holding that once a lawyer learns his or her client committed perjury, his or her continued representation “without rectification or disclosure would assist the client in committing a crime or fraud...”)
- No – this is Texas, and it’s the Wild West down there.

Scenario #8 – The Dishonest Deponent

- **ABA MRPC 3.3(b) – the duty to correct clients' false statements**

(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.

(c) The duties stated in paragraphs (a) and (b) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.

Scenario #8 – The Dishonest Deponent



- *State Bar of Texas, Professional Ethics Committee Opinion No. 692*
- *But what can you do moving forward with Mr. Mayhem?*



Questions?