

VBBA/VBJDRC ANNUAL CLE 9/22/2006 – HOT TOPICS IN ETHICS

ANSWERS! Please provide to attendees after session and post on site with the CLE credit sheets 😊

Hypotheticals

1. The Tainted Camper and the Mountain Vacation (30-45 minutes)

Client Larry Lothario retains lawyer Olga Outdoors. By way of background, Larry and Olga previously met at a campground on a church retreat a few years back and the families both enjoyed the trip immensely. Olga and her husband and kids admired Larry's camper, which was all decked out with the latest technology and glamping accessories.

Unfortunately, the values shared by all at the church retreat escaped Larry at some point, and he began a tumultuous affair with his neighbor, Lucy Loosemorals. Lucy and Larry often escaped to the camper for romantic interludes, and Larry's wife, Hannah Henpeck, grew suspicious of all of Larry's constant multi-hour sudden trips to Wal-Mart to "run errands." She noticed that Larry often came home with his clothes disheveled and that when he would return after hours of "errands," he usually only had batteries or a new toothbrush. Unbeknownst to Larry or Lucy, Hannah eventually put a recording device in the camper and when she reviewed the tapes, she learned of his extramarital endeavors.

During the discussion of marital assets, Larry shares with Olga that he needs to get rid of the camper because Lucy becomes enraged every time she looks at it, and she has told him that if he wants to settle the case amicably, or have any chance of shared custody, she never wants to see the camper again. Olga wants to help her client, so she offers to take the trailer and park it at her office, which has a huge parking lot and is way out of Hannah's usual path.

Since the camper is just sitting there, Olga and her family decide to take it with them and use it for a mountain vacation. On the vacation, Olga's puppy has several accidents in the camper, but Olga cleans it up and you can't really smell it as long as the windows are open. Sometimes, when Olga and her husband fight, she goes to the camper to cool off. She has decided to keep some of her work clothes and personal items in the camper to make it more convenient.

Questions (Hint: Rule 1.8 and 1.15 are implicated here):

1. Has Olga done anything wrong in offering to keep the camper for Larry?
Not yet. If she keeps it safe and securely stores client property, she is compliant with 1.15
2. Has Olga done anything wrong by using the camper?
Yes. Olga is using the client's property for her own uses **without his agreement in violation of 1.8 because she is taking a possessory interest in this property that is ultimately adverse to him if the value is lowered by his use. She is not keeping it safe for him and preserving it, so she has run afoul of 1.8 and 1.5 at this point, especially when her dog "devalues" it. Since**

the client is losing value here, and since it is marital property that is being wasted to an extent, her client may be on the hook for the lowering of the value is an issue as well.

3. What if Larry offers to let Olga use it in exchange for storage?
Since her use is not adverse to him (until the value is lowered and his wife finds out), this is more of a gray area for these rules if the client agrees in writing per 1.8... What's problematic is - This is not solely his property to lend out, and Olga is benefitting from his situation and the confidential information that he has shared in a way that is likely to be frowned upon by the bar in light of 1.8 and 1.15.
4. What if Olga buys the camper? Can Larry give her a great discount since he needs to get rid of it to appease Hannah and have a chance at shared custody?
Yes. He can sell it to her and that would not be a violation of 1.8 IF he sells it to her at a fair price (a discount is not necessarily unfair since he is a motivated seller), there is a written contract, and if he obtains independent counsel to advise him on the sale.
5. What happens if Larry finally finds a buyer for the camper, but the buyer takes a look inside and asks, "What's that smell?" Olga is in trouble per 1.15 – she has lowered the value when she was supposed to be keeping it safe.
6. Has Olga done anything wrong by keeping her personal items in the camper? Again, see #1.
Yes, she is taking possession of his property without his consent and knowledge and in a way that is adverse to his interests. If he agrees, and puts that in writing, and there is no devaluing, this may not necessarily be a violation, but it is certainly not best practice with respect to professionalism.
7. Switching gears, if you represent Hannah...
 - a. What rule should be nagging at you when Hannah comes to you with the recording and why? 1.2(C) – Scope of Representation – Counseling a Client (c) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent. Recording two people without their knowledge is illegal when the person recording is not a party to the conversation.
 - b. What if Hannah tells you that she only put the recording device into the camper because she was worried about people breaking into the camper to sleep or that she suspected that her teen sons were going in there to party? Does that change your answer? Yes. If Hannah was not trying to record people, and used a security camera for legit reasons, she has not done anything illegal. You did not tell her to do anything illegal, so you are not a foul of the rule at this point.
 - c. Regardless of (a) and (b) above, do you present the recording at trial to prove adultery? Maybe. If the recording was not gained illegally, and if the Husband knew of the security cameras, you can be confident that the recording is fair game. If you suspect that Hannah is not being honest, and was wiretapping, you cannot be comfortable with this course of conduct, although, if Hannah provided you with the recording and YOU did NOT tell her to do it, it is not your responsibility to prevent a past act.
NOTE: Discussion of hacked emails or passwords being breached would be appropriate here. If the client does something questionable before you undertake

the representation, that is different than if you advise them to do it. NOTE: Admissibility and ethical rules are NOT the same.

2. Elizabeth, the GAL and the firm of Charles, Charles, and Charles (20-30 minutes)

- A. Attorney Elizabeth Mountbatten had a solo practice for several years and focused on domestic issues and Guardian *Ad Litem* practice. During that time, she represented the interests of a young boy, William, who was age 2 when Elizabeth was first appointed. The case was in and out of court for years, and Elizabeth developed a splendid rapport with young William, whose mother was tragically killed in an auto accident and whose father was awarded custody thereafter, but the maternal grandmother, Camilla, had joint custody.

(BONUS POINTS IF YOU CAN GUESS WHAT DAY I WROTE THIS AND WHAT WAS ON TV)

Eventually, Elizabeth grew weary of the solo practice and decided to join the law firm of Charles, Charles, and Charles. Her work chum, Harry Styles, who had been at the firm for several years, had represented Camilla in a prior incarnation of the custody case involving William, but the case was inactive for several years before Elizabeth joined the firm.

About a year after Elizabeth made the switch, Camilla, now represented by attorney Joe Jonas, filed for primary custody after William's father decided to relocate with the child over her objection. The Court reappointed Elizabeth, who quickly realized that she had an issue because Harry had been at her firm last time the case was in court and now she was going to be reinvolved with the case.

Questions (Hint: Rule 1.10 is implicated here):

1. What should Elizabeth do? Does she have to decline the representation?
Maybe... there IS a conflict according to 1.10... While lawyers are associated in a firm, none of them shall represent a client when the lawyer knows or reasonably should know that any one of them practicing alone would be prohibited from doing so by Rules 1.6, 1.7, 1.9, or 2.10(e). Since her partner could not be GAL (that's still potentially adverse to the former client), it's an imputed conflict. BUT... it is waivable.
2. Since Camilla has a different lawyer now, does Elizabeth even have to bring up the issue to the attorneys representing the parties? Yes, It is an imputed conflict and she needs to disclose it and get waivers.
3. Elizabeth is saving the Court Order to her file and stumbles upon the electronic file containing all of Harry's letters and notes from his representation of Camilla. Can she read them to refresh her recollection or to gain insight into Camilla's position? NO. This is information gained by her partner in the former representation and she cannot use this conflictual relationship to gain an advantage. PLUS, she may see some correspondence that reveals confidences given to her partner, so she needs to steer clear of these files.

4. If she comes across letters Harry wrote to her or to opposing counsel, can she look at those since they are not confidential and they were already sent to her? **Still no. She would NOT have access without the former representation, so she cannot exploit this former representation to make her job easier.**
5. If Elizabeth decides not to look at the file, can she ask Harry to provide her with copies of the letters that were sent to her and to opposing counsel? **YES. In the interests of avoiding the appearance of impropriety, she should ask BOTH attorneys to provide any information that may be helpful to her including old correspondence. That way, the attorneys may consult with their respective clients and all is transparent and no advantage is gained from the association with the former counsel for the party.**

Discussion point – many attorneys believe that GALs are different in terms of conflicts, but they are not. The representation may be adverse and in any event, it has potential to be adverse, so there are the same ethical rules that apply to opposing parties. LEO 1870 was very direct in addressing this issue but many people thought that only applied to communications, but it's everything. GALs are lawyers too.

3. Mommy MaryJane (20-30 minutes)

Mommy MaryJane has 3 kids under the age of 8, and she retains you to represent her in a Child Protective Services case involving “lack of supervision” allegations that arose when her children were roaming in the neighborhood unsupervised. On a warm summer day in 2022, the neighbors called police, concerned because the children were seen at the neighborhood pool and running around the neighborhood, but nobody could find an adult that appeared to be supervising them. The police responded, located where the children reside, took them home, and called CPS. CPS noted that the house was quite messy and that the kids were dirty and chaotic and opened a family assessment that eventually became an investigation.

MaryJane confides in you that when CPS became involved, she had been asleep at 2 p.m. while her kids were napping and when her kids woke up, she did not hear them because she had smoked a bunch of weed before she decided to take a nap of her own. CPS is unaware of her drug use and has not asked for a drug test, but they have recommended services including a parenting class and a “clean and healthy home” workshop.

MaryJane tells you that she doesn't see any problem with her smoking weed because it's legal, and that she does not smoke in the house with the children present. She emphasizes that she always waits until the children are asleep before she smokes, and that she always goes outside. She tells you that when it's raining or when the kids are stirring, she eats weed gummies instead of going outside and smoking, since she wants to be sure they are safe and not exposed to the smoke. After all, she says, how is it different from drinking a glass of wine at dinner, which many parents do with their kids present?

Questions (Hint – Rule 1.2):

- A. How do you address MaryJane's interactions with CPS since they do not know that she smokes weed? Can you counsel her to hide it from them? **Yes. You cannot let her LIE, or provide false information to the Court, but you CAN and should keep her confidential information confidential under 1.6. She is not, at this point, doing anything illegal by failing to disclose this information to CPS.**
- B. Given that marijuana is legal in Virginia with respect to private personal use, how do you counsel her regarding what may happen if the case goes to Court? **Under 1.2 (C), you MUST discuss the legal consequences of any proposed course of conduct with a client and counsel or assist a client to make a good faith effort to determine the validity, scope, meaning, or application of the law. While personal use is not illegal in Virginia presently, that DOES NOT mean there are no legal ramifications of her conduct. Laws with respect to child abuse, neglect, etc., are still applicable in this case and even though what she is doing in using the marijuana is not illegal, what she is doing in neglecting her children is worth a discussion since it is materially related to the scope of your representation.**
- C. Since this is just a CPS case at the moment, are you obligated to talk with MaryJane about where she is buying the marijuana, whether she is breaking Federal law, or whether she is otherwise conducting herself in a way that could prejudice her in a potential court case? **Yes. 1.2 specifically imparts this duty to discuss the interaction with Federal law, and currently, if she is, for instance, transporting the marijuana across state lines, or in airports, or whatever, she may be violating Federal Law and you have an obligation under 1.2 to discuss this with her.**
- D. If the case goes to court and CPS asks for a drug test, what do you do, knowing what you know? **You should object, protest, and try to assist your client while also counseling your client to get help with conducting herself in a way that is safer for her kids and herself. You cannot make a false representation or commit a fraud, but you do not have to offer up your client in a way that will prejudice her interests.**
- E. Since marijuana is legal in Virginia, what argument do you make and why? **Pursuant to 1.2, you have to discuss all of the applicable statutes with your client, just as you would if your client were drinking to excess or using prescription drugs in a dangerous way.**
- F. Are there competence and diligence issues here since CPS is involved? **Yes. The standards of all rules including 1.1 and 1.3 are the same when your client's interests are at issue. Even if it is ONLY administrative and not in litigation yet, you are engaged in the representation and must adhere to the same standards as if the matter were in court. You may not lie or commit a fraud or commit any act that calls your honesty or fitness to practice law into question even if the matter is not in court.**