

# Ethics Trivia

Anna Berman



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## Rules

- Get into Teams
- Answer as a Team
- Keep your Team score
- Talking is encouraged
- Have fun!

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## Question 1

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### Privileged?

Ashley Attorney hires Ed Expert to perform a damages analysis in a misappropriation of trade secrets case pending in Missouri state court. Ed is retained as a testifying expert. Due to the complexity of the case, the parties agreed to exchange “federal-like” expert reports – *i.e.* a written report that discloses all of the expert’s opinions. While the parties agreed to exchange federal-like expert reports, the parties do not enter any agreement regarding the work product associated with those reports. Therefore, standard Missouri state law applies.

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## Privileged?

Ashley and Ed work closely on Ed's report, exchanging numerous communications and drafts. While Ed is knowledgeable and capable of completing the report himself, he has a family emergency in the weeks before the report is due. The emergency prevents him from devoting any time to the report during that time. Ashley ends up making the final revisions/editions to the report herself.

## Privileged?

After receiving Ed's report, Opposing Counsel Oscar subpoenas Ed for a deposition and includes document requests for "all documents received from Ashley," "all communications with Ashley," and "all drafts" of Ed's report.

Ashley is furious. She believes the subpoena is overbroad and clear attempt to invade the work product privilege. Ashley intends on instructing Ed not to respond to the document requests.

## Privileged?

### TRUE or FALSE

Ashley is correct. Communications between Ed and her, and drafts of Ed's report (including those prepared by Ashley), are protected from disclosure.

## Privileged?

Mo. S. Ct. R. 56.01(b)(4): "A party may discover by deposition the facts and opinions to which the expert is expected to testify."

"The deposition, with no specific limitations, allows for opposing counsel to probe the expert on the expert's qualifications, knowledge of the subject, information the expert has been provided, the expert's opinions, and all other matters bearing on the expert's opinions and the bases for the opinions." *State ex rel. Tracy v. Dandurand*, 30 S.W.3d 831, 834–35 (Mo. 2000).

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## Privileged?

“Missouri cases require an expert to produce at deposition the materials that the expert has reviewed in order that the opposing attorney be able to ‘intelligently cross-examine the expert concerning what facts he used to formulate his opinion.’” *Dandurand*, 30 S.W.3d at 834–35 (quoting *State ex rel. Seitrich v. Franklin*, 761 S.W.2d 756, 758 (Mo. App. 1988)).

“It may be suggested that materials given to an expert can be withheld from disclosure if the expert did not rely upon them. There is no such exception in the rule or Missouri precedents.” *Dandurand*, 30 S.W.3d at 834–35.

## Privileged?

Ashley should closely review *Dandurand* before instructing Ed to withhold documents or ignore the document requests in the subpoena.

*Dandurand* states that anything given to the expert – *e.g.* drafts, facts, information, documents, etc. – is discoverable.

## Question 2

## Disclosure

Larry Lawyer specializes in adoption law and represents Penny. Penny is pregnant. Penny tells Larry that the birth father (Frank) wants to raise the baby with his parents. Penny wants to give the baby up for adoption.

Larry and Penny decide to employ a “passive strategy,” in which he and Penny will “actively do nothing” to communicate with Frank or his attorney. They will not advise Frank or his attorney about the adoption plans, the child’s birth, or the instigation of any legal proceedings.

## Disclosure

Frank’s attorney contacts Larry. During that call, Frank’s attorney tells Larry that Frank will not consent to the adoption. Larry acknowledges this and says “there will be no adoption without Frank’s consent.”

Penny also tells Frank that her due date was changed from April to May. In reality, her due date has not been changed. She is still due in April.

## Disclosure

The baby is born and Larry initiates the adoption proceedings. The matter is set for hearing in April. Neither Frank nor his attorney are informed of the birth, the initiation of legal proceedings, or the hearing.

At the hearing, in response to questioning from Larry, Penny testifies that Frank was consulted at length about the pregnancy and that he has not stepped forward since the child's birth to claim any rights to the child. The court grants the petition for adoption.

## Disclosure

Frank later learns of the birth and the adoption. He hires a new attorney to try and obtain custody. He also files a bar complaint against Larry.

In response to the bar complaint, Larry argues he had no obligation to provide Frank with the baby's due date or notify him of the hearing. He notes that Penny was not legally required to provide Frank this information, and that requiring Larry to do so was not in his client's best interest. Also, Frank was represented by counsel who could have taken action to protect Frank's rights.



## Disclosure

### TRUE or FALSE

Larry was required to notify Frank's attorney of the baby's due date and the adoption hearing.

## Disclosure

*In re: Sanford P. Krigel, SC95098 (decided January 26, 2016).*

The Missouri Supreme Court found that Larry (a/k/a Sanford Krigel) committed numerous ethical violations.

## Disclosure

1. MRPC 4-3.3(a)(3) – Prohibits a lawyer from offering evidence the lawyer knows to be false. Larry’s representations to the Court during the adoption hearing were designed to portray the false impression that Frank was not interested in the child or his parental rights.
2. MRPC 4-4.1(a) – Prohibits a lawyer from making a false statement of material fact or law to a third person. Larry said the child would not be adopted without Frank’s consent. He made this statement after counseling Penny on the “passive strategy.”

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## Disclosure

3. MRPC 4-4.4(a) – Prohibits a lawyer from using means that have no substantial purpose other than to embarrass, delay, or burden a third person. Larry’s concealment of information from Frank and his attorney served no substantial purpose other than to impair and delay Frank’s assertion of his parental rights.
4. MRPC 4-8.4(d) – Provides it is professional misconduct to engage in conduct that is prejudicial to the administration of justice. In signing the Petition for Adoption, Larry falsely certified that no one other than Penny claimed to have rights to the child.

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## Disclosure

Attorney was suspended for 6 months, with a stay pending completion of 2 years probation.

Decision splits Court 4-3. The dissenting justices wanted a tougher sentence, one arguing for disbarment.

More information:

- <https://law.justia.com/cases/missouri/supreme-court/2016/sc95098.html>
- <https://www.bizjournals.com/kansascity/news/2015/10/26/adoption-case-could-bring-kc-attorney-a-suspension.html>
- <https://www.bizjournals.com/kansascity/news/2016/01/26/sanford-krigel-missouri-supreme-court-discipline.html>

## Question 3

## Fee Dispute

Elaine Esq. represented Connie regarding a commercial lease agreement. Connie was attempting to rent office space in downtown Kansas City. Elaine eventually terminated the representation because Connie stopped paying Elaine's invoices. When Elaine terminated the representation, Connie owed her over \$10,000.

## Fee Dispute

Elaine tried to work with Connie on reasonable payment arrangements, but Connie never followed through. Elaine eventually referred the claim to a debt collection agency. Elaine provided the collection agency with documentation to support her claim for fees, including copies of the billing invoices that Connie had failed to pay and a copy of Elaine and Connie's engagement letter.

## Fee Dispute

The invoices Elaine provided to the collection agency included the following descriptions:

- Research easements and title issues
- Meet with client to discuss terms provided by landlord
- Review and revise proposed lease agreement
- Meet with client regarding proposed lease
- Draft letter to landlord regarding proposed lease and revisions thereto

## Fee Dispute

### TRUE or FALSE

By providing detailed billing invoices to the collection agency, Elaine revealed confidential client information in violation of Rule 1.6.

## Fee Dispute

While a lawyer may reveal confidential client information where necessary to prove services rendered in an action to collect a fee, the disclosure must be limited to only what is reasonably necessary for that purpose.

KRPC 1.6(a) and MRPC 4-1.6(a) prohibit a lawyer from revealing “information relating to the representation of a client unless the client consents after consultation,” subject to certain exceptions. One of those exceptions is Section 1.6(b)(3), which states:

“A lawyer may reveal such information to the extent the lawyer reasonably believes necessary... to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and 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 concerning the lawyer’s representation of the client.”

## Fee Dispute

Comment [20] to KRPC 1.6:

“[T]he lawyer must make every effort practicable to avoid unnecessary disclosure of information relating to a representation, to limit disclosure to those having the need to know it, and to obtain protective orders or make other arrangements minimizing the risk of disclosure.”

See KBA Legal Ethics Op. 94-5, discussing Op. 90-3.

There is no similar Comment to MRPC 4-1.6, but the language of Rule 1.6 is the same.

## Fee Dispute

Connie, or the Disciplinary Board, would argue that the billing descriptions were not reasonably necessary to prove the amount of the debt owed by Connie to Elaine. The statements could have been redacted to limit the disclosure.

*However*, the facts can change. If Connie disputes the reasonableness of the fee charged, that certainly would change the facts and would trigger a permissible disclosure Rule 1.6(b)(3):

“...respond to allegations in any proceeding concerning the lawyer’s representation of the client...”

## Question 4

## Rejected

Abby is the administrator of her father's estate. She believes that her father's caregivers committed negligence that caused her father's wrongful death. Abby consults with Lou Lawyer about a possible malpractice and wrongful death lawsuit.

## Rejected

Lou calculates that the statute of limitations on Abby's claim will expire on June 22, 2016. He prepares the petition and files the lawsuit on June 22, 2016.

On June 23, 2016, Lou receives an email from the Court Clerk rejecting the June 22, 2016 petition. The email states that the petition was rejected because the plaintiffs listed in the online e-filing form and those in the caption of the petition do not match. Lou modifies the online e-filing form and re-files the petition. Lou makes no changes to the petition itself. The petition was file-stamped on June 23, 2016.



## Rejected

The defendants are served and promptly file a motion to dismiss claiming that the petition is outside the statute of limitations. Lou files an opposition, outlining the rejection and attaches his emails with the Court Clerk. Lou does not provide an affidavit or declaration. And while Lou argues that the June 22 petition was the same as the June 23 petition, he provides no evidence to support that argument.

After hearing the arguments of counsel, the Court grants the motion to dismiss.

## Rejected

**TRUE or FALSE**

The Court's ruling was incorrect.

## Rejected

*Lambert v. Peterson, et al.* (No. 117,344), decided April 19, 2019.

Kansas Supreme Court affirmed the trial court's ruling. Noted:

- Lou converted the motion to dismiss to one for summary judgment by using emails with the Court Clerk. *See* K.S.A. 60-212(d).
- Therefore, Lou was required to present affidavits, declarations, discovery, or disclosure materials on file to present genuine issue of material fact on the statute of limitations issue. *See* K.S.A. 60-256(e)(2).

## Rejected

Court found that “proof that counsel file the same petition on June 22, 2016, was a material fact and needed to be established” for Lou to succeed.

The Court found Lou could have done this, but didn't.

- Pointed to Kansas Supreme Court Administrative Order No. 268, which requires counsel to retain a record of the filing transmission and the full copy of the document filed.

## Rejected

“[A]ll we can conclude based on the factual record is that [Abby’s] lawyer filed a medical malpractice action on June 22, 2016...We cannot make the critical link between the exhibit showing an attempt to file a medical malpractice action and *the* particular medical malpractice action filed by [Abby] without some affidavit, declaration, or testimony by a competent affiant, declarant, or witness based on his or her personal knowledge setting forth facts that would be admissible into evidence.” (citations omitted).

This likely creates an ethical issue in any jurisdiction related to competence.

## Question 5

## Reaching Out

Barbara and Bob Big Shot are big shot lawyers at Big Shot Law Firm in Kansas City. They practice in both Kansas and Missouri and they both are members of Big Shot Law Firm's intellectual property practice group. They frequently work together on the same matters and are very close.

Like all lawyers, they are dedicated to their clients and the success of their practices. They work long hours, which they believe is necessary to adequately serve their clients.

## Reaching Out

Barbara and Bob know they work a lot, and they try to unwind and unplug from the challenges of the legal profession. Drinking helps them cope with the stress and to relax at the end of a hard day. Drinking also provides them an opportunity to network with potential clients and colleagues.

While Barbara and Bob know they drink more than the average non-lawyer, they don't think they drink more than the average lawyer.

## Reaching Out

In the past few months, Bob notices that Barbara is drinking more than usual. Bob has seen her have too many drinks and become “sloppy” during firm functions and during networking events. Bob also has noticed that Barbara started missing more work than usual.

While Bob is concerned about Barbara, he is conflicted about what to do. Bob believes Barbara’s drinking has hit an unacceptable level, but remembers that she didn’t drink at all at the last networking event and he has never seen her impaired at the office.

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## Reaching Out

### TRUE or FALSE

Bob should consult with Big Shot Law Firm’s ethics counsel regarding Barbara’s alcohol use.

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## Reaching Out

KRPC 8.3 / MRPC 4-8.3

(a) A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority

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## Reaching Out

Whether or not Bob “knows” of an issue that “raises a substantial question” as to Barbara’s “fitness” is difficult here.

Things to consider:

1. Barbara is missing more work than usual
2. She did not drink at last event
3. Bob has not seen her impaired at work, and he would probably be in a position to know

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## Reaching Out

This is a difficult issue for our profession to discuss, but the statistics are staggering:

- Between 21-36% of attorneys qualify as problem drinkers (1 in 3 of our colleagues)
- These rates are 3-5 times higher than government estimates in the general population

Mental health issues also impact our profession. 28%, 19%, and 23% are struggling with some level of depression, anxiety, and stress.

## Reaching Out

**Do not be afraid to reach out for yourself or others.**

Every state has a lawyer assistance program that provides confidential services and support to lawyers facing substance use disorders or mental health issues. LINK:

[https://www.americanbar.org/groups/lawyer\\_assistance/resources/lap\\_programs\\_by\\_state/](https://www.americanbar.org/groups/lawyer_assistance/resources/lap_programs_by_state/)

More information:

- <https://www.cnn.com/2016/02/06/opinions/lawyers-problem-drinkers-krill/>
- <https://www.hazeldenbettyford.org/about-us/news-media/press-release/2016-aba-hazelden-release-first-study-attorney-substance-use>

## Question 6

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### Tit for Tat

Allen Attorney is well connected in the Kansas City community and actively involved with numerous charities, government organizations, and bar associations. He knows a lot of people and lots of lawyers. Because of this, Allen is often able to connect individuals in need with a lawyer that fits their needs just right.

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## Tit for Tat

One day, Allen starts a conversation with Linda. She tells him that she recently discovered mold in her newly purchased home. Linda believes the mold was intentionally concealed by the seller (a prominent Kansas City businesswoman), the seller's real estate agent, and the home inspector. Allen quickly remembers that Allison has experience handling cases like this and refers Linda to her.

Allison agreed to take Linda's case and found significant evidence of fraud. The case settled handsomely in Linda and Allison's favor.

## Tit for Tat

Over the holiday season, Allen receives numerous gifts from his many friends. This year, Allen receives a \$150 bottle of wine from Allison. The note with the bottle thanks Allen for referring Linda to Allison.

## Tit for Tat

### TRUE or FALSE

Allison's gift was inappropriate under the Missouri Rules of Professional Conduct.

## Tit for Tat

MRPC 4-7.2(c):

A lawyer shall not give anything of value to a person for recommending the lawyer's services, except that:

1. A lawyer may pay the reasonable cost of advertising or written communication permitted by this Rule 4-7.2;
2. A lawyer may pay the reasonable cost of advertising, written communication, or other notification required in connection with the sale of a law practice as permitted by Rule 4-1.17; and
3. A lawyer may pay the usual charges of a qualified lawyer referral service registered under Rule 4-9.1 or other not-for-profit legal services organization.

## Tit for Tat

Similar rule in Kansas (Rule 7.2(c)):

A lawyer shall not give anything of value to a person for recommending the lawyer's services, except that a lawyer may pay the reasonable cost of advertisements or communications permitted by this rule and may pay the usual charges of a not-for-profit lawyer referral service or other legal service organization.

## Tit for Tat

“[S]hall not give anything of value” for referrals. There is no exception for nominal or non-monetary gifts.

Based upon ABA Model Rule 7.2.

NOTE: ABA Model Rule 7.2 was amended in 2018. It now allows for nominal gifts as an expression of appreciation to a person for recommending the lawyer's services or referring a prospective client. The Comments specify that the gift cannot be any more than a token item as might be given for holidays or other ordinary social hospitality.

## Question 7

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### Friend-ly

You represent the plaintiff in a discrimination and harassment case filed in Johnson County, KS. The defendant will be represented by your arch nemesis, Dale Defense. You have squared off with Dale in two other employment cases. Dale beat you both times and you are ready to settle the score. While you always give your best to your clients, you are going to go above and beyond here to beat Dale.

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## Friend-ly

The case is assigned to Judge. You begin conducting research on Judge, including his background, rulings, and preferences. During your research you discover Judge's Facebook page. You do not typically review a judge's Facebook page, but you cannot leave any stone unturned in this case.

The page is mostly posts of Judge's grandchildren. But something catches your eye. In the "connections" section, you see that you and Judge have a common Facebook friend – DALE.

## Friend-ly

Your mind is spinning. Is this friendship going to bias Judge's rulings in the litigation?

Blinded by your desire to beat Dale, you file a Motion for Change of Judge under K.S.A. 20-311d. Judge denies your motion without a hearing. Following the statute, you then file an affidavit outlining that because Judge and Dale are friends, the Judge's "personal bias" prevents your client from obtaining "a fair and impartial trial." Your affidavit is submitted to another judge, who also denies your motion without a hearing.

## Friend-ly

### TRUE or FALSE

Judge's Facebook friendship with Dale required Judge to recuse himself from your case.

## Friend-ly

### Judicial Canon 3

A judge may engage in extrajudicial activities...a judge shall not:

...

- b) Participate in activities that will lead to frequent disqualification of the judge;
- c) Participate in activities that would appear to a reasonable person to undermine the judge's *independence, integrity, or impartiality*...

Question becomes whether Facebook friendship with an attorney would appear "to a reasonable person to undermine the judge's *independence, integrity, or impartiality*".

## Friend-ly

Courts routinely say – NO. But “context is key.”

Facebook friendship is not a legally sufficient basis to disqualify a judge. “A Facebook ‘friend’ may or may not be a ‘friend’ in the traditional sense of the word.”

Nothing here indicates that Judge and Dale are *really* friends.

Opinions on point from Arizona, New Mexico, and Florida. *See also* ABA Formal Opinion 462.

## Question 8

## Conflicted

Simon Solicitor is an asbestos plaintiff's attorney in St. Louis. He is a partner at ABC Law. ABC Law has a broad litigation practice, including employment, intellectual property, and personal injury. A small component of the firm's practice is Simon's asbestos group.

Simon routinely litigates against the same defense attorneys at XYZ Law. They are good lawyers and Simon has built a good relationship with them and their nonlawyer assistants.

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## Conflicted

During a break in a deposition, Simon begins chatting with Lucy Legal Assistant. Lucy is with XYZ Law and works opposite of Simon on the asbestos cases. Lucy confides in Simon that she is not happy at XYZ Law. She feels "trapped" in the asbestos group, but she really wants to explore other areas of the law. XYZ Law will not transfer her, because she is really good at the asbestos work.

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## Conflicted

Simon feels bad for Lucy. Suddenly, he remembers that the employment group at his firm is looking for a legal assistant. He recommends Lucy to the employment group, raves about her skills as a legal assistant, and provides them with Lucy's contact information.

Simon later learns that the employment group hired Lucy. Simon was not involved in the hiring process and Lucy is walled off from the asbestos group. XYZ Law is furious. It moves to disqualify ABC Law from all of the asbestos cases, claiming that Lucy's hiring creates a conflict of interest.

## Conflicted

### TRUE or FALSE

There is no conflict of interest under Missouri law. Lucy can work for the employment group at ABC Law.

## Conflicted

### MRPC 4-1.9

(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.

...

(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.

## Conflicted

### MRPC 4-5.3

Lawyers are required to make "reasonable efforts" to ensure that nonlawyer assistants act in accordance with the professional obligations of the lawyer. Lawyers are responsible for the conduct of nonlawyer assistants if they (1) order or ratify the conduct, or (2) are a partner, manager, or supervisor of the law firm employing the nonlawyer assistant, know of the conduct, and fail to take appropriate remedial measures.

## Conflicted

Lucy is held to same ethical standards as an attorney, per 4-5.3.  
Lawyers cannot switch sides, neither can Lucy.

But just as an attorney can leave XYZ Law, so can Lucy. ABC Law has to make sure that appropriate ethical walls are put in place:

1. Lucy is not working in the asbestos group
2. She is walled off from the asbestos group
3. No evidence that she shared confidential information with ABC Law or used confidential information to the detriment of XYZ Law clients

## Question 9

## Dirty Laundry

Jessie Jurist is a former prosecutor. He recently left public service to start his new life as a solo practitioner focusing on criminal defense work in Missouri.

In walks Morty. Morty is a suspected member of the Italian Mafia. Jessie heard about Morty during his time at the prosecutor's office, but Jessie did not work any of those cases and no charges were ever brought. Morty saw a LinkedIn post discussing Jessie's new firm and he wants Jessie to represent him.

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## Dirty Laundry

Morty wants to have Jessie on retainer for \$20,000/month. In exchange, Jessie will be at Morty's beck and call, agreeing to come to Morty's aid whenever Morty may need him.

Jessie agrees. This is a really great deal for him! Jessie accepts the first month retainer and puts it into his general firm trust account with his other client trust funds.

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## Dirty Laundry

At the end of the first month, Jessie has billed just \$1,500 to Morty. This is for a few hours billed amending some traffic tickets. Rather than replenishing the \$1,500 difference to maintain a \$20,000 retainer, Morty asks Jessie to refund the unspent portion of the retainer – \$18,500 – and Morty issues a new \$20,000 check for Jessie’s client trust account.

This goes on for several months. Even when Jessie bills nothing, Morty still asks Jessie to refund the retainer so Morty can reissue it the next month.

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## Dirty Laundry

Jessie gets to thinking about his arrangement and wonders why Morty needs Jessie on retainer at all. After all, Morty never gets into legal trouble, certainly not the kind that requires a \$20,000/month retainer. And what is the point of refunding and reissuing the retainer each month?

It dawns on Jessie that Morty could be using Jessie’s trust account for money laundering. Jessie wants to alert the authorities, but is concerned about his ethical obligations.

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## Dirty Laundry

### TRUE or FALSE

Jessie may report Morty to law enforcement.

## Dirty Laundry

### MRPC 4-1.6

(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 Rule 4-1.6(b).

## Dirty Laundry

MRPC 4-1.6

...

(b) A lawyer may reveal information relating to the representation...

- (1) to prevent death or substantial bodily harm that is reasonably certain to occur;
- (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...
- (4) to comply with other law or a court order; or
- (5) to detect and resolve conflicts of interest.

## Dirty Laundry

Missouri has no crime exception!

Compare with KRPC 1.6:

...

(b) A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:

- (1) To prevent the client from committing a crime...

## Dirty Laundry

The duty of confidentiality prohibits Jessie from alerting the authorities to Morty's likely money laundering.

This really is a thing. See <https://www.acfe.com/fraud-examiner.aspx?id=4294997680>. Attorney trust accounts can be a target because Tax ID information is not always collected.

What should Jessie do?

**Withdraw.** See MRPC 4-1.2(f) ("shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal")

## Question 10



## Dirty Laundry

Jessie follows your advise and withdraws from the representation of Morty. Morty is pretty angry about this and, like all savvy gangsters, writes a negative online review about Jessie.

In the review, Morty claims Jessie committed malpractice and mishandled a variety of matters on Morty's behalf. He even goes so far as to imply that Jessie was laundering money through Morty!

## Dirty Laundry

Jessie obviously is furious. Jessie is embarrassed that he, a former prosecutor, was duped by a criminal. He feels used and angry that he cannot even report Morty to the police.

Jessie decides to take out his frustration by responding to Morty's negative review. Jessie's response outlines many inaccuracies in Morty's review – *e.g.* that Jessie only handle a few minor matters for Morty, that all matters were resolved to Morty's satisfaction, that Morty kept Jessie on retainer months after the matters were resolved, etc. Jessie also refers to Morty as a "goodfella," who used Jessie, but doesn't explain what that means.

## Dirty Laundry

### TRUE or FALSE

Jessie's response to Morty's negative online review violated Missouri Rules of Professional Conduct.

## Dirty Laundry

### MRPC 4-1.6

(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 Rule 4-1.6(b).

## Dirty Laundry

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

- (1) to prevent death or substantial bodily harm that is reasonably certain to occur;
- (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 concerning the lawyer's representation of the client;
- (4) to comply with other law or a court order; or
- (5) to detect and resolve conflicts of interest.

## Dirty Laundry

In most circumstances, Rule 4-1.6 prohibits a response.

A negative online review generally does not constitute a “controversy” sufficient to trigger the exception in 4-1.6(b)(3).

Here, there really is no “controversy.” Morty hasn’t sued Jessie, there is no disciplinary proceeding, etc. Hard to characterize a negative review (even a false one) as a “controversy” sufficient to trump Rule 4-1.6.

## Question 11

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### Mis-Stating

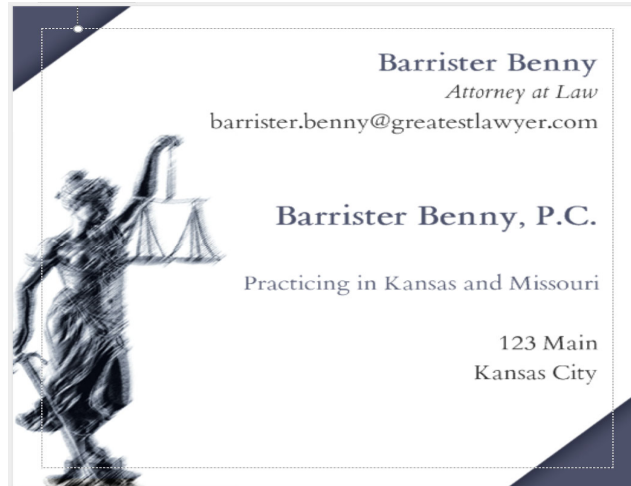
Barrister Benny is licensed in Missouri only. He has a fairly busy family law practice in Missouri, but sometimes handles cases in Kansas by obtaining *pro hac vice* admission.

Benny recently moved offices and needs to update his business cards. He is thinking about something like this:

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## Mis-Stating



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## Mis-Stating

**TRUE or FALSE**

Benny's business cards are misleading.

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## Mis-Stating

KRPC 7.1(a) / MRPC 4-7.1(a)

A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it:

- (a) contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading;
- (b) is likely to create an unjustified expectation about results the lawyer can achieve, or states or implies that the lawyer can achieve results by means that violate the rules of professional conduct or other law; or
- (c) compares the lawyer's services with other lawyer's services, unless the comparison can be factually substantiated.

## Mis-Stating

*In re Franco*, 66 P.3d 805, 810, 275 Kan. 571, 577 (Kan. 2003).

- An occasional *pro hac vice* admission does not amount to “practicing.”
- “The clear message intended to be conveyed by [Benny’s] business cards was that he could and did practice in Kansas. Candor required him to disclose that ‘practicing’ was misleading...A reasonable person, when given such information on a card, would conclude that [Benny] was licensed in Kansas.”

# Kutak Rock | *Thank You!*

KANSAS CITY



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