

# Ethics Trivia: Real-Life Ethical Issues Facing Corporate Counsel

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## Rules

- Get in teams.
- Answer as a Team.
- Keep your Team score.
- Talking is encouraged.
- Have fun!

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# Question 1

## Betsy Blogger

In-House is investigating an EEOC Charge of Discrimination for sexual harassment brought by Betsy. As part of the investigation, In-House interviews Co-Worker, who tells her that Betsy likes to blog and posts sexual “tips” on her blog. Co-Worker sees these posts because she follows the blog. Betsy controls her followers.

## Betsy Blogger

Without prompting from In-House, Co-Worker volunteers to print these blog posts for In-House. In-House agrees, accepts the printed posts from Co-Worker and uses the posts in the response to the EEOC. The post are sexually suggestive and will contradict Betsy's claims.

## Betsy Blogger

True or False: In-House's use of the blog posts was unethical because she violated Betsy's rights.

## Betsy Blogger

KRPC 4.4 / MRPC 4-4.4

“In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.”

## Betsy Blogger

KRPC 4.4 / MRPC 4-4.4

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## Betsy Blogger

Right to Privacy is a “legal right” implicated and protected by ethics rules.

However, Betsy did not have a right to privacy in her social media.

## Betsy Blogger

- Courts generally find that social media posts are public. Even posts on “private pages” do not carry a legitimate expectation of privacy.
  - *Nucci v. Target Corp.*, 162 So. 3d 146 (Fla. Dist. Ct. App. 2015).
  - *Romano v. Steelcase, Inc.*, 30 Misc. 3d 426, 431 (N.Y. Sup. Ct. 2010).
- Even if a plaintiff uses privacy settings that allow only “friends” to see postings, “[the plaintiff] has no justifiable expectation that [] ‘friends’ [will] keep [the] profile private. [In fact,] the wider [the] circle of ‘friends’, the more likely [the] posts would be viewed by someone [the plaintiff] never expected to see them.” *United States v. Meregildo*, 883 F. Supp. 2d 523, 526 (S.D.N.Y. 2012)(citation omitted).

# Question 2

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## Hawkish



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## Hawkish

True or False: The Texas Law Hawk's commercial violates Kansas Rules of Professional Conduct.

## Hawkish

KRPC 7.1 to 7.3 / MRPC 4-7.1 to 4-7.3

What constitutes "advertising that serves to denigrate the dignity of the profession or trust in Courts"?

Comment to MRPC 4-7.2 indicates that ethics counsel is unwilling to make judgments about whether advertising is "[t]asteful."

## Hawkish

False statements are prohibited.

Remember: The purpose of attorney advertising is to educate the public, not mislead.

*Bates v. State Bar of Arizona*, 433 U.S. 350 (1977); *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976).

## Question 3



## Spicy

Sugar and Spice are partners at a local law firm. The office begins interviewing candidates for a new associate attorney. Both Sugar and Spice interview candidates. One of the candidates is Applicant, a member of an affluent local family.

## Spicy

After their interviews, Spice tells Sugar that he does not like Applicant. Spice says that rich people are “stuck up,” spend their days swimming in giant pools of money and, therefore, Applicant will not work as hard as the other candidates.

## Spicy

Spice shares these thoughts with others at Sugar and Spice. Although the majority of the firm wants to hire Applicant, Spice holds enormous power at the firm and based on Spice's comments, the firm hires a similarly qualified candidate from a more humble background.

## Spicy

True or False: Spice's actions violated ethics rules.

## Spicy

### MRPC 4-8.4(g):

- “...manifest by words or conduct, in representing a client, bias or prejudice based upon race, sex, religion, national origin, disability, age, or sexual orientation.”

### KRPC 8.4(g) :

- “...engage in any other conduct that adversely reflects on the lawyer's fitness to practice law.”
- This is typically limited to conduct involving “moral turpitude.”

## Spicy

Spice probably did *not* violate Missouri or Kansas rules.

Spice probably *did* violate the ABA Model Rule based on his discrimination of Applicant based on socioeconomic status in conduct related to the practice of law.

## Spicy

### Model Rule of Prof'l Conduct 8.4(g)

“It is professional misconduct for a lawyer to...engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law. This paragraph does not limit the ability of a lawyer to accept, decline or withdraw from a representation in accordance with Rule 1.16. This paragraph does not preclude legitimate advice or advocacy consistent with these Rules.”

## Spicy

Adopted at ABA Annual Meeting in 2016.

Comments to Model Rule 8.4 previously contained anti-discrimination guidance, but the Comments are not the rule.

Key to the rule is “knows or reasonably should know is harassment or discrimination.”

- Expects conduct undertaken for “legitimate advice or advocacy.”
- Racially motivated peremptory challenges are not *per se* violation.
- <https://www.americanbar.org/publications/youraba/2016/september-2016/aba-adopts-anti-discrimination-rule-8-4-g--at-annual-meeting-in-.html>

# Question 4

## Slippery Slope

Company is sued for premises liability and retains Thurgood. Written discovery is exchanged. Thurgood is a good lawyer and consults with Representative (vice president and manager of Company) before responding to Requests for Admissions. The case progresses to trial.

## Slippery Slope

At trial, Plaintiff's counsel questions Representative about several responses to Company's Requests for Admissions, aimed at determining whether Representative authored the Company's responses. The following exchange occurs:

## Slippery Slope

**Q:** In response to #3, is that what you said?

**A:** The request is confusing.

**Q:** Is that because you didn't draft it?

**Thurgood:** Objection – I'm asserting privilege because Representative and I conferred on how to respond.

**Court:** Overruled.

**Q:** Did you draft answer #3? You said you didn't understand it but you swore it was true.

**A:** I can't confirm the answer to #3.

## Slippery Slope

True or False: The Judge correctly ruled that Representative's testimony was not privileged.

## Slippery Slope

*DeLaporte v. Robey Bldg. Supply, Inc.*, 812 S.W.2d 526, 532 (Mo. Ct. App. 1991).

"In Missouri, the attorney-client privilege is limited to protecting communications."

The question is whether preparing discovery responses is a "communication." It is not.

## Slippery Slope

Because the question from Plaintiff's counsel regarding whether Representative drafted the answer to Request #3 did not relate to a "communication" with counsel, it was not protected.

## Question 5



## Slippery Slope

As part of his representation of Company, Thurgood also is conducting an internal investigation as to whether mid-level management concealed fraudulent activity. Thurgood will provide legal advice as to how Company should proceed when his investigation is complete. Talker (a low-level employee) learns that Thurgood is conducting an investigation and asks to meet with Thurgood.

## Slippery Slope

Thurgood grants Talker's request, presuming Talker wants to discuss the investigation. Instead, Talker reveals various misdeeds by Company CEO including philandering and drug use (both involving Talker).

## Slippery Slope

Talker later sues Company and CEO. In discovery, Talker seeks Thurgood's notes from their meeting and subpoenas Thurgood to testify. Company objects to Talker's requests citing the attorney-client privilege.

## Slippery Slope

True or False: Thurgood's notes are not protected by the attorney-client privilege.

## Slippery Slope

Thurgood likely will be ordered to turn over notes from his meeting with Talker and could be compelled to testify.

## Slippery Slope

Communications with low-level employees are privileged if:

1. the communication was made for the purpose of securing legal advice;
2. the employee making the communication did so at the direction of his corporate superior;
3. the superior made the request so that the corporation could secure legal advice;
4. the subject matter of the communication is within the scope of the employee's corporate duties; and
5. the communication is not disseminated beyond those persons who, because of the corporate structure, need to know its contents.

*DeLaPorte v. Robey Bldg. Supply, Inc.*, 812 S.W.2d 526, 531 (Mo. Ct. App. 1991).

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## Slippery Slope

REWIND – During the meeting between Thurgood and Talker, Talker tells Thurgood “it is so nice to talk to you, and I know you will keep this confidential because you are my lawyer.”

Thurgood does not respond.

## Slippery Slope

True or False: Thurgood had no obligation to inform Talker he was not her lawyer.

## Slippery Slope

MRPC 4-4.3 / KRPC 4.3

“When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer’s role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding.”

## Slippery Slope

Talker expressed a misunderstanding of Thurgood’s role when she stated that Thurgood was her lawyer and would keep the meeting confidential. When Talker expressed that misunderstanding, it triggered an obligation for Thurgood to correct it.

# Question 6

## Hot Mess

Insurer denies coverage for a loss caused by fire and files suit against the Insured to determine coverage. Insurer uploads a video of the fire to a drop box and sends a drop box link to the National Insurance Crime Bureau. Insurer's email to NICB included the following:



## Hot Mess

CONFIDENTIALITY NOTICE: This e-mail contains information that is privileged and confidential and subject to legal restrictions and penalties regarding unauthorized disclosure or other use. You are prohibited from copying, distributing or otherwise using this information if you are not the intended recipient. If you received this e-mail in error, please notify me immediately by return e-mail, and delete this e-mail and all attachments from your system.



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## Hot Mess

Insurer then places the entire claims file and investigation file in the drop box for its attorney. Insurer sends the same link sent to NICB to attorney - the same link now accesses the claims and investigation files.



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## Hot Mess

Opposing counsel sends a subpoena to NICB. As part of its production, NICB produces the email from Insurer containing the link to the drop box. Opposing counsel types the link into her browser and accesses the drop box, including the video, claims file, and investigation file. There are privileged materials in both. She recognizes that some materials might be privileged, but she does not notify Insurer's attorney.

## Hot Mess

Insurer's attorney later receives discovery responses from opposing counsel, which includes the claims file and investigation file. He contacts opposing counsel and requests that the files be destroyed. He also disables the drop box. Opposing counsel admits that the contents of the drop box have been shared with all of those representing Insured, including the Insured.

## Hot Mess

Insurer's attorney files a motion to disqualify all of the Insured's counsel. Insured's counsel responds that Insurer waived the attorney-client privilege by posting the files on the drop box site.

## Hot Mess

True or False: Insurer did not waive privilege.

## Hot Mess

This involves inadvertent disclosure of privileged material. “Inadvertent disclosure” includes “action by the proponent of the privilege to knowingly, but mistakenly, produce a document or to unknowingly provide access to a document by failing to implement sufficient precautions to maintain confidentiality.”

*Harleysville Ins. Co. v. Holding Funeral Home, Inc.*, 1:15CV00057, 2017 WL 1041600, at \*3 (W.D. Va. Feb. 9, 2017).

## Hot Mess

In this case, the Insurer waived privilege because it did not take reasonable measures to maintain confidentiality. For example:

1. The drop box was not password protected.
2. Anyone could access the drop box using the hyperlink.

Court reasoned this was the same as leaving the documents on a public bench and telling opposing counsel where to find it.

## Hot Mess

Eighth Circuit follows the *Hydraflow* test:

- (1) the reasonableness of the precautions taken to prevent inadvertent disclosure in view of the extent of document production,
- (2) the number of inadvertent disclosures,
- (3) the extent of the disclosures,
- (4) the promptness of measures taken to rectify the disclosure, and
- (5) whether the overriding interest of justice would be served by relieving the party of its error.

*Gray v. Bicknell*, 86 F.3d 1472, 1484 (8th Cir. 1996).

## Hot Mess

True or False: Opposing counsel committed an ethical violation by not informing Insurer's counsel of the material on the drop box.

## Hot Mess

MRPC 4-3.4 / KRPC 3.4

Prohibit disobeying rules of Court.

Same as Virginia rule at issue in *Harleysville*.

*Federal rules require counsel to return or destroy privileged information.*

## Hot Mess

Court found that opposing counsel's failure to notify Insurer's counsel that privileged information had been produced violated this rule.

- Opposing counsel was "on notice" due to the disclosure in the NICB email.
- Did not notify Insurer's attorney of the disclosure.
- Did not seek a Court order before using and distributing the information.

## Hot Mess

“The lowest common denominator, binding lawyers and laymen alike, is the statute and common law. A higher standard is imposed on lawyers by the Code of Professional Responsibility...[W]e emphasize that more is expected of lawyers than mere compliance with the minimum requirements of that standard. The traditions of professionalism at the bar embody a level of fairness, candor, and courtesy higher than the minimum requirements of the Code of Professional Responsibility.”

*Gunter v. Virginia State Bar*, 385 S.E.2d 597, 621 (Va. 1989).

## Question 7

## Conflicted

Barrister is hired to represent Large-Corp, Sub-Corp and Smaller-Corp in an employment dispute. The Petition alleges that all three companies should be considered Plaintiff's employer because they all have the same board members and individuals in leadership positions, and those individuals influence the actions of all entities.

## Conflicted

While running conflicts, Barrister learns that Large-Corp, Sub-Corp, and Smaller-Corp are related entities. Large-Corp owns 100% of Sub-Corp and Smaller-Corp. Sub-Corp is solvent, but Smaller-Corp is not. There is talk that Smaller-Corp may file bankruptcy.



## Conflicted

Despite the allegations in the Petition, all three companies did not employ the Plaintiff. Sub-Corp is the true employer. Large-Corp wants to volunteer this information to Plaintiff's counsel in an effort to extract Large-Corp and Smaller-Corp from the litigation.

## Conflicted

True or False: There is no conflict of interest between Large-Corp, Sub-Corp and Smaller-Corp, and Barrister may represent all three without a waiver.

## Conflicted

MRPC 4-1.7 / KRPC 1.7

A lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

- (1) [T]he representation of one client will be directly adverse to another client; or
- (2) [T]here is a substantial/significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client...

## Conflicted

Conflict exists here because:

- Solvency issues related to Smaller-Corp (insolvency may impact Barrister's representation of Smaller-Corp versus other entities).
- Dispute as to employer and Large-Corp's desire to get out of the litigation.

# Question 8

## Google-Me

Injured files a medical malpractice action against Doctor. The case is proceeding to trial. During *voir dire*, Injured's attorney asks the panel whether any of them has been a party to a lawsuit. Juror 136 answers "no." Juror 136 is chosen to sit on the jury.

## Google-Me

The jury returns a verdict for Doctor. Injured's attorney then searches CaseNet and discovers numerous suits involving Juror 136, none of which are substantially similar to the Injured-Doctor litigation. Injured files a motion for new trial.

## Google-Me

Doctor opposes the motion for new trial and argues that Injured's challenge to Juror 136 is untimely. Doctor contends that Injured could have discovered Juror 136's inaccurate answer through online searches before the jury was impaneled. Injured counters that he was too busy to run the searches.

## Google-Me

True or False: Injured's challenge was timely.

## Google-Me

*Johnson v. McCullough*, 306 S.W.3d 551, 559 (Mo. 2010)(en banc).

- Court found that objection was timely, but cautioned counsels to make “reasonable efforts” to conduct searches ahead of time.
- This opinion pre-dated Mo. S. Ct. R. 69.025.
- Rule 69.025 makes it a requirement to search CaseNet *before* jury is sworn.

## Google-Me

- Rule 69.025 does not apply to other information available online – e.g. Facebook posts.
- *See Khoury v. Conagra Foods, Inc.*, 368 S.W.3d 189 (Mo. Ct. App. 2012)
  - Jury verdict stricken for anti-corporate sentiments on Facebook.
  - Because social media is not covered by Rule 69.025, Court found post-trial objection was timely. Still encouraged litigants to search early.

## Question 9

## High Times

Solicitor is a well-respected real estate attorney in Kansas. She is contacted by Investor, located in Colorado, who wants to purchase real estate in Colorado. Solicitor clears conflicts and begins working on the transaction.

## High Times

Through the due diligence process, Solicitor discovers that the real estate which is the subject of the transaction will be used for the cultivation of marijuana. The cultivation and sale of marijuana is legal in Colorado, where the property is located. However, the cultivation and sale of marijuana is illegal under Federal law and in Kansas, where Solicitor is located and licensed. Solicitor contacts Investor about the discovery.

## High Times

Investor tells Solicitor that she is not directly involved in the marijuana business by simply facilitating the purchase of the real estate. A separate company, which Solicitor does not represent, will lease the property to the marijuana business after the purchase is complete.

## High Times

True or False: Solicitor cannot assist Investor in the real estate transaction without violating Kansas Rules of Ethics.



## High Times

MRPC 4-1.2(f) / KRPC 1.2(d)

“A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent...”

No opinions on how these Rules would be interpreted by discipline authorities.

## High Times

Jurisdiction matters:

- Ohio Supreme Court Advisory Opinion 2016-6 finds that this representation violates Rules because the rule “does not distinguish between illegal client conduct that will, or will not, be enforced by the federal government”.
- Pennsylvania is proposing amendments.
- Colorado permits the representation, but federal courts opted out.

# Question 10

## Supervisory Fail

Kansas and Missouri are partners at Law Office. Kansas is licensed in Kansas and Missouri is licensed in Missouri. Kansas and Missouri represent Client in a Kansas trade secret matter. Missouri is the lead attorney, but Kansas signs all the pleadings. They do not move to admit Missouri *pro hac vice*.

## Supervisory Fail

Missouri misses several deadlines in the case and fails to respond to the opposing party's motion for summary judgment. Kansas mentions the pending motion for summary judgment to Missouri the day Client's opposition is due. Kansas suspects that Missouri does not have an opposition prepared, but does not want to step on Missouri's toes and makes no effort to inquire regarding the status of either an opposition or a motion for extension. Judgment is eventually entered against Client.

## Supervisory Fail

After judgment is entered, Client requests a status update from Missouri. Missouri (falsely) tells Client the case can be settled. Client grants Missouri authority to settle and Missouri later tells Client the case is settled. Missouri sends Client her portion of the settlement.

## Supervisory Fail

Kansas asks Missouri about the payment and learns what has happened. Kansas does not report Missouri's ethics violations.

## Supervisory Fail

True or False: Kansas is not responsible for Missouri's conduct because Kansas and Missouri are both partners.

## Supervisory Fail

KRPC 5.1 / MRPC 4-5.1

- Partners (or equivalent) must make reasonable efforts to ensure the firm has measures giving “reasonable assurance” of compliance.
- Lawyer with “direct supervisory authority” must make “reasonable efforts” to ensure compliance of subordinates.
- Lawyer is responsible for another lawyer’s conduct if:
  - Lawyer orders or ratifies the conduct.
  - Lawyer is a partner (or equivalent), or has “direct supervisory authority”, and “knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.”

## Supervisory Fail

Kansas is likely responsible for Missouri’s missing the response deadline to the motion for summary judgment.

No requirement that “other lawyer” be subordinate to the partner.

*In re Roswold*, 292 Kan. 136, 249 P.3d 1199 (2011).

- Found Kansas as *de facto* partner of all Kansas cases because only Kansas licensed attorney
- Kansas is liable independently as a supervisory attorney and liable for Missouri’s own ethical violations

# Bonus

## Risky Business

Corporate Counsel begins a romantic relationship with Corporate Employee. Corporate Employee works with Corporate Counsel to purchase equipment. Although the original deal would have resulted in Corporation owning the equipment, the final deal has Employee owning the equipment and leasing it to Company at a premium.

## Risky Business

Corporate Counsel notices this change on the deal documents and confronts Corporate Employee. Corporate Employee admits to this “error” and promises to fix the documents before the deal is finalized. Since Corporate Employee is making this change and seems really sorry, Corporate Counsel agrees not to notify the Board of Directors.

## Risky Business

Corporate Employee corrects the deal paperwork before the deal is finalized. Corporate Employee and Corporate Counsel eventually end their relationship, amicably. No one ever discovers they were romantically involved.

## Risky Business

True or False: Corporate Counsel violated her ethical duties to Corporation.

## Risky Business

Many possible violations here.

- Corporate Counsel's protection of Corporate Employee conflicted with her obligations to Corporation (Rule 1.7).
- Corporate Counsel had obligation to notify the Board of Directors of Corporate Employee's conduct (Rule 1.13).
  - Rule requires action if employee has "intent to act" against interests of corporation.
  - Employee's draft is sufficient.
- Possible Rule 1.8 violation for sexual relationship.
- Possible Rule 1.13(d) violation for adverse interest between Board of Directors and Corporate Employee.

*Matter of Bergman*, 305 Kan. 429, 382 P.3d 455 (2016).



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Ms. Moneymaker practices primarily in the areas of health care regulation, compliance and business transactions. She advises clients regarding health care governance, Stark Law compliance, HIPAA reporting and compliance, the Anti-Kickback Statute, 340B compliance and Medicare/Medicaid compliance. She has experience negotiating and drafting a wide range of contracts for health care organizations including provider employment contracts, service agreements, referral agreements, affiliation agreements and collaborative practice agreements. Ms. Moneymaker also advises regarding compliance with federal and state regulations related to Health Information Exchanges (HIE).

Ms. Moneymaker has experience advising Federally Qualified Health Centers (FQHC) regarding regulatory compliance issues including HRSA requirements and the Federal Tort Claims Act (FTCA). She advises regarding all aspects of the FTCA including coverage evaluation through litigation management.

Prior to joining Kutak Rock, Ms. Moneymaker was general counsel and chief compliance officer for a health care organization and previously practiced in the areas of business and employment litigation.



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Ms. Berman has a broad commercial practice with an emphasis on complex commercial litigation, insurance and coverage work, landlord-tenant disputes, auto finance, and creditor's rights issues.

Ms. Berman counsels a variety of clients during the litigation process, including advising on risk management strategies, conducting mediations and arbitrations, and representing clients through trial and appeal. Ms. Berman devotes a portion of her time to various pro bono initiatives. She assists with the Kansas City Metropolitan Bar Foundation's Military Matters program, which provides free legal services to Kansas City veterans and active duty military; and also volunteers her time with Legal Aid's Adopt-a-Neighborhood program, providing free legal services to a neighborhood in Kansas City's urban core.