

ETHICS QUESTIONS
PROFESSOR STEPHEN A. SALTZBURG

Answer Yes or No to Each of the Questions*

Twenty General Questions

1. You represent a company negotiating to sell its assets to another company. Your client has told you prior to your negotiating with the other side that it will take no less than \$1million dollars. Opposing counsel has opened negotiations with an offer of \$750,000. May you say to her, "my client has authorized me take no less than \$1,250,000" as a bargaining strategy?

Model Rule 8.4 (c): Professional misconduct to engage in conduct involving dishonesty, fraud, deceit, or misrepresentation

2. You represent a company negotiating to sell its assets to another company. Your client has told you prior to your negotiating with the other side that it will take no less than \$1million dollars. Opposing counsel has opened negotiations with an offer of \$750,000. May you say to her, "my client has an offer in hand of \$1,250,000" if you are merely bluffing?

Model Rule 8.4 (c): Professional misconduct to engage in conduct involving dishonesty, fraud, deceit, or misrepresentation

3. You represent a company negotiating to sell its assets to another company. Your client wants you present at the negotiations as an advisor but wants to handle the negotiation himself. The opposing party has opened negotiations with an offer of \$750,000. Your client asks for time to consult with you privately and asks you, "May I say to her, 'I have an offer in hand of \$1,250,000' which is not true?" May you say yes?

Model Rule 8.4 (c): Professional misconduct to engage in conduct involving dishonesty, fraud, deceit, or misrepresentation

4. You represent a company negotiating to sell its assets to another company. Your client is frustrated by the failure of the other side's counsel to show interest in the negotiations and asks you to call the other side's lawyer to complain and to ask for faster action. May you call and

* There may be no single correct answer to some of the questions. Some answers may depend on facts not provided in these short questions. The purpose of the questions that have no right answer is to point out possible pitfalls for the unwary. The purpose of all the questions is to remind us all of some important principles that we must keep in mind at all times. The answer to some questions may turn on procedure or evidence rules that impose obligations or limitations upon lawyers.

complain?

Sure

5. You represent a company negotiating to sell its assets to another company. Your client calls you and says “I am frustrated by the failure of the other side’s counsel to show interest in the negotiations and I ask you to call the other side’s lawyer to complain and to ask for faster action.” May you call and say to opposing counsel “my client is frustrated with the pace of the negotiations and wants to see them pick up speed”?

Model Rule 1.6(a) : Duty to protect information relating to representation

6. You represent a company negotiating to sell its assets to another company. You believe that opposing counsel is not promptly conveying your client’s offers to opposing counsel’s client. You see that your client is frustrated by the failure of the other side’s counsel to act promptly. May you call the opposing party directly and convey your client’s offer?

Model Rule 4.2 : No communication with represented party

7. You represent a company negotiating to sell its assets to another company. You believe that opposing counsel is not promptly conveying your client’s offers to opposing counsel’s client. You see that your client is frustrated by the failure of the other side’s counsel to act promptly. May you write a letter to opposing counsel with your client’s offer and cc: opposing counsel’s client?

Model Rule 4.2: No communication with represented party

8. You represent a company negotiating to sell its assets to another company. You believe that opposing counsel is not promptly conveying your client’s offers to opposing counsel’s client. Your belief is confirmed when you receive a call from the opposing party who says to you, “I’m calling because I don’t think my lawyer is giving me your offers. What was your last offer?” May you answer the question?

Model Rule 4.2 : No communication with represented party

9. You represent a company negotiating to sell its assets to another company. Negotiations have been difficult. An individual whom you represent in another matter reveals to you in confidence that the lawyer representing the other company had previously represented him in another matter, unrelated to your representation of him or the company that is negotiating to sell its assets, and that the lawyer had sexual relations with him on several occasions during the representation and that the individual felt pressured to have sex with the lawyer. May you call or write the opposing counsel and tell him that unless the negotiations to sell the assets are

completed in two weeks, you are going to inform the state bar of his sexual activity with a client?

Some States have Rule 4.5: Lawyer may not threaten to bring disciplinary charges “solely to obtain an advantage in a civil matter”

10. You represent a company negotiating to sell its assets to another company. Negotiations have been difficult. An individual whom you represent in another matter reveals to you in confidence that the lawyer representing the other company had previously represented him in another matter, unrelated to your representation of him or the company that is negotiating to sell its assets, and that the lawyer had sexual relations with him on several occasions during the representation and that the individual felt pressured to have sex with the lawyer. Your client says to you, “now don’t say anything about this to anybody.” May you accede to your client’s wishes?

Model Rule 1.6(a) : Duty to protect information relating to representation

Model Rule 8.3 (a): Lawyer knows another lawyer committed violation of rules that raises a substantial question of fitness

11. You represent a company negotiating to sell its assets to another company. Negotiations have been difficult. An individual whom you represent in another matter reveals to you in confidence that the lawyer representing the other company had previously represented him and his wife in another matter unrelated to your representation of him or the company that is negotiating to sell its assets, and that the lawyer had sexual relations with his wife on several occasions during the representation and the end result was a divorce. Your client says to you, “now don’t say anything about this to anybody.” May you accede to your client’s wishes?

Model Rule 1.6(a) : Duty to protect information relating to representation

Model Rule 8.3 (a): Lawyer knows another lawyer committed violation of rules that raises a substantial question of fitness

12. You as outside counsel are asked by the Board of Directors to do an internal investigation for a company that suspects that overseas subsidiaries may have made payments that violate the Foreign Corrupt Practices Act. The President of the Company asks you to prepare a letter for employees directing them to cooperate with your investigation, and your letter in substance reads as follows: “Outside counsel has been retained to investigate whether any member of the company has made payments to foreign officials that violate US law. Your cooperation is essential so that counsel can protect us as much as possible from the consequences of any improper payment(s).” When you arrive to interview employees, you bring them a copy of the letter and assure yourself that each has read and understood the letter. You then interview the employees. Have you acted with due diligence?

Model Rule. 4.3: Must be careful not to create impression of representing employees

13. You as outside are asked by the Board of Directors to do an internal investigation for a company that suspects that overseas subsidiaries may have made payments that violate the foreign corrupt practices act. The President of the Company asks you to prepare a letter for employees directing them to cooperate with your investigation, and your letter in substance reads as follows: "Outside counsel has been retained to investigate whether any member of the company has made payments to foreign officials that violate US law. Your cooperation is essential so that counsel can protect us as much as possible from the consequences of any improper payment(s)." When you arrive to interview employees, you bring them a copy of the letter and assure yourself that each has read and understood the letter. You then interview the employees. Several employees ask you straight out: "Should I hire my own lawyer?" Can you answer the question?

Model Rule 4.3: Should the lawyer advise to get counsel?

14. A state court judge has appointed you to represent a husband accused of spousal abuse. You have never represented a criminal defendant and you personally detest people who abuse their spouses. May you refuse the appointment?

Model Rule 1.1: Is lawyer competent?

Model Rule 6.2 (c): Is the cause so "repugnant"?

15. A new client has asked you to represent him in a relatively simply uncontested divorce. You agree and inform him of your standard hourly rate and the additional charges for which he may be responsible. May you proceed with the representation without providing the client with a retention letter?

Model Rule 1.5 (b): Preferably in writing

16. A prospective client has come to see you and explained that she has been threatened with a lawsuit claiming breach of an oral contract. She denies having promised to sell a Picasso to the prospective plaintiff and wants to sell it to another purchaser for much more than the prospective plaintiff claims she promised to take. You tell the prospective client that the statute of limitations for breach of an oral contract is one year, and from what she has told you about the prospective plaintiff's claim it will expire in a month and if no suit has been filed she is free to sell the painting to anyone she wants. You also decline to represent the prospective client because the case doesn't seem like it would generate sufficient fees. Two weeks later you realize that the statute of limitations is two years, not one. Must you notify the prospective client even though you declined the representation?

You have provided legal advice. You must fix it.

17. A prospective client has come to see you and explained that she has been threatened with a lawsuit claiming breach of an oral contract. She denies having promised to sell a Picasso to the prospective plaintiff and wants to sell it to another purchaser for much more than the prospective plaintiff claims she promised to take. You tell the prospective client that you steer clear of art cases and you decline to represent her, but based on what she told you there clearly was no oral contract that binds her. She sells the painting to another purchaser. Has a lawyer-client relationship been created?

You have provided legal advice

18. A prospective client has come to see you and explained that she has been threatened with a lawsuit claiming breach of an oral contract. Although you never take art cases, you politely hear the prospective client relate the facts and hear her deny having promised to sell a Picasso to the prospective plaintiff and wanting to sell it to another purchaser for much more than the prospective plaintiff claims she promised to take. You then tell the prospective client that you steer clear of art cases and you decline to represent her. Having declined the representation, do you have any duty to the client you turned down?

No, But Model Rule 1.18 (b): Protect consultation information.

19. A prospective client has come to see you and explained that she has been threatened with a lawsuit claiming breach of an oral contract. Although you never take art cases, you politely hear the prospective client relate the facts and hear her deny having promised to sell a Picasso to the prospective plaintiff and wanting to sell it to another purchaser for much more than the prospective plaintiff claims she promised to take. You then tell the prospective client that you steer clear of art cases and you decline to represent her. A week later the prospective plaintiff contacts a partner in your firm and asks her to represent him in a suit against prospective client to enforce an oral contract to buy a Picasso from prospective client. Having turned down the representation of prospective client, you opened no file, took no other action with respect to her, and did not disclose any information she disclosed to you to anyone in your firm. Your partner agrees to represent prospective plaintiff. Is there a problem here?

Model Rule 1.18 (c): Prospective clients; is there imputation?

20. Your firm has volunteered to assist a legal services “hotline” in providing legal advice to persons who otherwise might be unable to obtain such advice. One night you answer a call to provide legal advice to a caller who inquires about how to sue the City for nuisance as a result of the City’s putting in a 24- hour police walk-in station too close to the caller’s apartment. Unbeknownst to you, your firm represents the City in three pending actions raising exactly the same nuisance claim. Have you breached a duty?

Model Rule 6.5 (a) (1) : Lawyer must know there is a conflict

Joint Defense and Common Interest

21. You represent one of four radio stations in North and South Carolina that are negotiating with the FCC regarding compliance with its public service requirements. Each of the other three stations has separate counsel. No litigation is pending and none of the stations expects to engage in litigation with the agency. May your client enter into a “joint defense” or “common interest” agreement with the three other stations in an effort to assure that all four stations can share information without waiving attorney-client privilege or work product protection?

Common interest privilege

22. Assume that your client does enter into a “joint defense” or “common interest” agreement with the other three stations, do you have a lawyer-client relationship with the other three stations?

Not if you have done it right

23. Assume that your client is considering entering into a “joint defense” or “common interest” agreement with the other three stations. Must any such agreement be in writing?

No

24. Should any such agreement be in writing?

Yes

25. Assume that your client does enter into a “joint defense” or “common interest” agreement with the other three stations, may you disclose to the FCC confidential information provided by another station if that information advances your client’s position in negotiations with the agency and you do not seek the other station’s consent?

No

26. Assume that your client does enter into a “joint defense” or “common interest” agreement with the other three stations, and one of the other stations decides they like your firm’s work and wants to drop its current counsel to hire your firm. Your client has no objection. May you accept the new representation?

Yes, there is no conflict

27. Assume that your client does enter into a “joint defense” or “common interest” agreement with the other three stations, and one of the other stations decides they like your firm’s work and wants to drop its current counsel to hire your firm. Your client objects on the ground that it does not want the other station to benefit from your work since it is a competitor. May you accept the new representation?

Model Rule 1.7 (a)(2): Will representation of one client be materially limited by responsibilities to another

28. Assume that your client does enter into a “joint defense” or “common interest” agreement with the other three stations, and after a period of time your client decides that the approach that the four stations have taken is not working and that a new approach should be taken. Counsel for the four stations meet, you explain the bare outlines of the new approach, and none of the other counsel agree with the strategy. You tell them your client is withdrawing from the “joint defense” or “common interest” agreement to pursue its own strategy. They claim that, having received confidential information from them, you may no longer represent your station to pursue a strategy that they regard as antithetical to their interests. Are they correct?

No

29. You represent one of four radio stations in North and South Carolina that are negotiating with the FCC regarding compliance with its public service requirements. Each of the other three stations has separate counsel. No litigation is pending, but all counsel agree that there might be an administrative proceeding in which testimony and evidence will be presented. Your client enter into a “joint defense” or “common interest” agreement with the three other stations in an effort to assure that all four stations can share information without waiving attorney-client privilege or work product protection, but along the way your client becomes dissatisfied with the joint approach, withdraws from the agreement, and adopts its own strategy. At an administrative hearing, witnesses for the other three stations are called to testify and you want to cross-examine them. The other stations object and move to disqualify you for a conflict of interest. Will they prevail?

Depends on the nature of the agreement

30. Given questions 21-29, do you believe that you ought to give more careful thought than ever before to whether to advise a client to enter into a “joint defense” or “common interest” agreement?

Yes

False Statements

31. You represent a plaintiff who alleges he was denied an apartment because he is African-American. You have a paralegal who is African-American and ask him to go to the leasing agency and see if he can rent the apartment. Have you violated any ethical rules?

Model Rule 8.4 (c): Professional misconduct to engage in conduct involving dishonesty, fraud, deceit, or misrepresentation
But See Bar opinions

32. You represent a plaintiff who alleges he was denied an apartment because he is African-American. You have a paralegal who is a former investigative reporter. May you ask your paralegal to contact the leasing agency, pretend to be a representative of a public opinion firm, and ask questions about attitudes toward leasing property to minorities?

Model Rule 8.4 (c) Professional misconduct to engage in conduct involving dishonesty, fraud, deceit, or misrepresentation

33. You represent a company who is bidding on certain government contracts for Iraq and Afghanistan. The company has sought your help in preparing an attractive bid and its submission to the government states that “company has had no allegations of illegal activity made against it in its entire existence.” You discover after the bid was submitted that the company pled nolo contendere to foreign corrupt payments two year earlier. Must you disclose the truth?

Model Rule 3.3. (a)(1): Failure to correct material fact; is this a tribunal?

34. You represent a company who is bidding on certain government contracts for Iraq and Afghanistan. The company stated in its submission to the government, which you had no role in preparing, that “company has had no allegations of illegal activity made against it in its entire existence.” You saw the submission after it was given to the government and immediately realized that you knew that the company pled nolo contendere to foreign corrupt payments two year earlier because you negotiated the plea. Must you disclose the truth?

No. You made no statement. Is this a tribunal anyway?

35. You represent a company sued by a former in-house counsel who claims age discrimination in his termination. During the deposition of the President/CEO, she swears in response to the plaintiff lawyer’s questions that the company has never before been charged with age discrimination. You discover that three years earlier, two former employees filed charges with the EEOC of age discrimination and the company settled their claims before the EEOC took any action. Must you disclose this to the plaintiff’s counsel?

Model Rule 3.3 (a)(3): Has false testimony been offered? If so, it must be corrected.

36. You represent a company sued by a former in-house counsel who claims age discrimination in his termination. During the deposition of the President/CEO, she swears in response to the plaintiff lawyer's questions that the company has never before been charged with age discrimination. You discover that three years earlier, two former employees filed charges with the EEOC of age discrimination and the company settled their claims before the EEOC took any action. Your company and the plaintiff have agreed to voluntary mediation before a retired federal judge who now works for JAMS. The retired judge asks to see the depositions of the parties, along with the complaint and answer. Must you disclose to the retired judge that the President/CEO's testimony was false?

Model Rule 3.3 (a)(3): Has false testimony been offered? If so, it must be corrected.

Model Rule 8.4 (c): Professional misconduct to engage in conduct involving dishonesty, fraud, deceit, or misrepresentation

37. You represent a company sued by a former in-house counsel who claims age discrimination in his termination. During the deposition of the President/CEO, she swears in response to the plaintiff lawyer's questions that the company has never before been charged with age discrimination. You discover that three years earlier, two former employees filed charges with the EEOC of age discrimination and the company settled their claims before the EEOC took any action. The trial judge has ordered the parties to appear in chambers for a settlement conference and has asked to see the depositions of the parties prior to the conference. Must you disclose to the judge that the President/CEO's testimony was false.

Model Rule 3.3 (a)(3): Has false testimony been offered? If so, it must be corrected.

Model Rule 8.4 (c): Professional misconduct to engage in conduct involving dishonesty, fraud, deceit, or misrepresentation

38. You represent a company charged by a former employee with sexual harassment. The former employee claims that a supervisor said he would not promote her unless she went to bed with him. You call your client to testify and the plaintiff's lawyer asks him whether he ever forged a check. You object to the question, but the trial judge overrules the objection and says the question is permissible under Fed. R. Evid. 608 (b). Your client says "absolutely not." You know from your client that he pled guilty to the misdemeanor charge of forging a check in a juvenile proceeding 15 years earlier. You have the judgment showing the finding of delinquency. Must you disclose that your client's answer was false?

Model Rule 3.3 (a)(3): Is it material?

39. You are appearing for the defendant at a settlement conference before a federal magistrate judge who has required representatives of both sides to appear with "settlement authority." Your client has authorized you to take \$15,000 to settle the case but has told you not to reveal that to the judge or the plaintiff. The judge excuses the other side and asks you, "what

is your authority to settle?" May you answer the question?

Model Rule 1.6 (a): Better to duck.

40. **The Hardest Question.** You represent as outside counsel a drug company (Excel) sued by the parents of a child with asthma who suffered permanent brain damage after her doctor administered a drug manufactured by your company (CureAll) while she had a fever. The only active ingredient in CureAll is a generic drug (KnownByAll). The parents have sued the doctor, his clinic, the hospital where the girl was taken, and your company. The doctor has filed a cross-claim against your company. During discovery, both the parents and the doctor file requests for documents and interrogatories in which they seek to know whether there are and, if so, to obtain: (a) any letters relating to CureAll sent to doctors, (b) any correspondence with the FDA or any federal or state agency relating to CureAll, (c) any articles relating to CureAll whether written in-house or contained in outside publications, and (d) any in-house or external evaluations relating to CureAll's advantages and disadvantages if administered to asthmatic children. You have a meeting with a senior vice-president of the company and in-house counsel. They both instruct you that they do not wish to voluntarily provide anything to the parents and the doctor and they want to take the narrowest possible approach to the discovery requests. The vice-president tells you that he has examined the records of the company and there are only a couple of documents that specifically mention CureAll. There are documents that mention KnownByAll, but the discovery does not mention the generic drug and the company does not want to volunteer these documents. In-house counsel recommends providing only the documents that specifically mention CureAll and leaving the parents and the doctor with the task of seeking additional discovery if they want it. May you accept this recommendation?

Model Rule 3.4 (d): May not make a reasonably diligent effort to comply

41. Same facts as 40. You are a junior partner. You go to a senior partner who is responsible for the drug company account and relate the facts and ask whether you may accept the recommendation. The senior partner says "it's your call." Is the senior partner absolved of responsibility for the decision you make?

Model Rule 5.1 (a), (b): Not absolved

42. Same facts as 40. You are a junior partner. You go to a senior partner who is responsible for the drug company account and relate the facts and ask whether you may accept the recommendation. The senior partner says "do what they want." Are you absolved of responsibility for the decision?

Model Rule 5.2(a): Not absolved

Some Conflict Issues

43. You represent the owner of a property owner whom you represented before land use officials and for whom you obtained zoning approval two years ago for a shopping center. Yesterday you received a call from WalMart asking you to represent it as it seeks to negotiate a lease with the property owner to become lead tenant in the shopping center. May you accept the representation?

Model Code 1.9: Is this a substantially related matter? Cannot use or reveal information to detriment of former client

44. You represent the owner of a property owner whom you represented before land use officials and for whom you obtained zoning approval two years ago for a shopping center. Your representation received some press attention, since the zoning was opposed by some environmental groups. Yesterday you received a call from property owner 2 who wants to seek rezoning for another shopping center one-half mile from the property you obtained the zoning for two years earlier. May you accept this representation?

Model Code 1.9: Is this a substantially related matter? Cannot use or reveal information to detriment of former client

45. You have been negotiating for a long time on behalf of a publicly held company with the SEC as to sanctions for your company's late filing of required forms. One lawyer at the SEC whom you know to be terrific is on the market as you have learned from a headhunter. Can you hire her if she worked on your matter for the government without having to give up the representation of the company in the matter pending before the SEC?

Model Code 1.11(b)(2): Personal and substantial participation for government; screening

46. You served as a court-appointed mediator in an action by Lee against Grant. Apparently you impressed the parties, because Lee has called you to seek to hire you to sue Grant in a matter unrelated to the mediation. May you represent Lee?

Yes

47. You served as a court-appointed mediator in an action by Lee against Grant. Apparently you impressed the parties, because Lee called you to seek to hire you to sue Grant in a matter unrelated to the mediation and you accepted the representation. Grant then calls you to seek to hire you to sue Lee in a matter unrelated to the mediation or to the lawsuit you agreed to file for Lee against Grant. May you represent Grant?

Model rule N.C. 1.7 (a)(2): Will representation be materially limited?

48. You are considering hiring a law clerk who is working for a federal district judge before whom you have a pending matter. May you interview the clerk while he is still employed

by the judge?

Yes

Some Closing Matters

49. You are admitted to practice in Virginia. You are asked to mediate a major piece of litigation in Atlanta, Georgia. May you accept the assignment?

Yes. Mediators need not be lawyers.

50. You are admitted to practice in North and South Carolina. You are asked to be the sole Arbitrator in an AAA sanctioned arbitration in Philadelphia. May you accept the assignment?

Yes. Arbitrators need not be lawyers.

51. You are admitted to practice in North and South Carolina. You have been asked to represent a party in an arbitration hearing to be held in New York City. May you accept the assignment?

Model Rule 5.5 (c)(3): The lawyer acts with respect to a matter that is in or is reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the lawyer's representation of a client in a jurisdiction in which the lawyer is admitted to practice and are not services for which pro hac vice admission is required

52. You are admitted to practice in Idaho. You have been asked to represent a party in a court-ordered mediation in Camden, New Jersey. May you accept the assignment?

N.C. 5.5 (c)(3): The lawyer acts with respect to a matter that is in or is reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the lawyer's representation of a client in a jurisdiction in which the lawyer is admitted to practice and are not services for which pro hac vice admission is required

53. You are admitted to practice in Virginia. You are counsel for the plaintiff in an intellectual property action filed in Virginia. A key witness lives in California. May you take the witness's deposition in California?

Model Rule 5.5 (c)(2): Reasonably related to pending proceeding and lawyer is authorized to appear.

54. You have retained an expert witness in a business tort case in which you are defending a company accused of interfering with the business prospects of another company. May you tell your expert that you don't want any e-mail or correspondence between her and you and that all communications between you must be oral and that you don't want the expert taking notes on any conversations?

Sure

55. The expert you retained in problem 54 is about to be deposed. The deposition is an ordinary non-videotaped deposition. May you instruct the expert that there will be no record of how long it takes her to answer questions, so she should consider pausing after each question and thinking through her answer before giving it?

Yes

56. The expert you retained in problem 61 is about to be deposed. May you instruct her that if you cough twice after she gives an answer, she should reconsider the answer?

No

57. The expert retained in problem 54 is in her deposition. You ask for a break, and your adversary, who had noticed and is taking the deposition, says: "no problem, let's take as much time as you want, but I instruct the witness not to talk to you during the break." May you ignore this instruction and talk to the witness during the break?

Yes