

# ULA MIDWEST REGIONAL FIELD MEETING LABORING WITH ETHICS

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WE-HAUL

Our hypothetical:  
with gratitude to Craig Becker

## PART ONE INTOLERABLE WORKING CONDITIONS

Employees of the private trash hauling company, We-haul, contact the Oppressed Workers Union (OWU) seeking the Union's assistance with intolerable working conditions. The Union sends its organizers to talk to the workers and determine what their grievances are. In the course of those discussions, the workers tell the organizers that they routinely work more than 40 hours per week but are not paid at a higher hourly rate for those overtime hours. The organizers report this fact to the Union's regular outside counsel. Counsel informs the organizers that that practice violates both the FLSA and state wage and hour law. Counsel also discusses the matter with the Union's officers who ask counsel to file suit on behalf of the workers.

WHAT ISSUES  
TO YOU SEE?



LET'S START  
AT THE  
BEGINNING



## WHO IS YOUR CLIENT?

- You can figure out who is your client by:
  - A. Looking at the Rules of Professional Conduct
  - B. Using the Restatement Third of the Law Governing Lawyers
  - C. Asking your supervisor
  - D. Not sure

# FORMATION. WHY DO YOU CARE ABOUT IDENTIFYING YOUR CLIENT?

**Confidentiality (e.g. Rule 1.6)**



**Loyalty (e.g. Rule 1.7)**



## RESTATEMENT THIRD OF THE LAW GOVERNING LAWYERS SECTION 14

- **Formation of the lawyer client relationship**
- A relationship of client and lawyer arises when:
  - (1) a person manifests intent to the lawyer the person's intent that the lawyer provide legal services for the person; and either,
    - (a) the lawyer manifests to the person consent to do so; or
    - (b) the lawyer fails to manifest lack of consent to do so and the lawyer knows or reasonably should know that the person reasonably relies on the lawyer to provide the services
  - (2) A tribunal with the power to do so appoints the lawyer to provide the services.



# RULE 1.18

AKA THE COCKTAIL PARTY RULE OR WATCH OUT FOR “GHOST” CLIENTS

- (a) A person who discusses with a lawyer the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client.
- (b) Even when no client-lawyer relationship ensues, a lawyer who has learned information from a prospective client shall not use or reveal that information, except as Rule 1.9 would permit with respect to information of a former client.
- Comment 2: “A person who communicates information unilaterally to a lawyer, without any reasonable expectation that the lawyer is willing to discuss the possibility of forming a client-lawyer relationship, is not a ‘prospective client’ within the meaning of paragraph (a).”

WHO IS YOUR CLIENT?

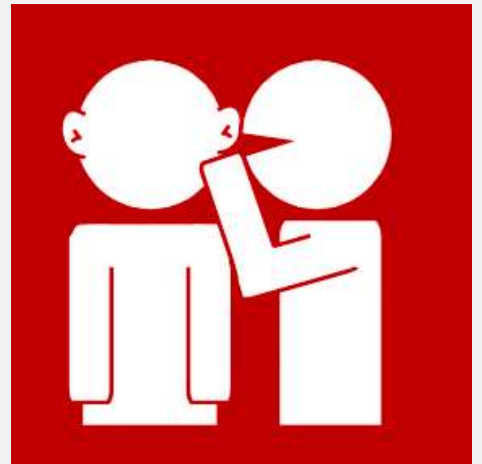
[Searching for a lawyer](#)

## RULE 1.13 ORGANIZATION AS A CLIENT

- (a) A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents
- See cmt [1] An organizational client is a legal entity, but it cannot act except through its officers, directors, employees, shareholders and other constituents. Officers, directors, employees and shareholders are the constituents of the corporate organizational client.

## WHAT ABOUT CONFIDENTIALITY FOR ORGANIZATIONAL CLIENTS?

- Cmt [2] When one of the constituents of an organizational client communicates with the organization's lawyer in that person's organizational capacity, the communication is protected by Rule 1.6.



## PART ONE (CONT'D) BACK TO OUR HYPOTHETICAL

Counsel prepares a retainer agreement and a consent form indicating that the worker wishes to be a plaintiff in an FLSA action and ask the organizers to sign up as many workers as they can on both the retainer and consent form.

Has counsel violated any of the rules of professional conduct?

Any other issues that you see?



## PART ONE (CONT'D) OUR HYPOTHETICAL

Counsel asks the organizers to gather contact information for the workers and then counsel calls the workers directly, discusses the pay issue, and asks those workers who indicate they have not been paid overtime if they wish to be represented by counsel and be parties to an action against their employer.

- Has counsel violated any rule of ethics?
- Do you have any other concerns?
- Would it matter in relation to either of the questions if counsel was in-house with the OWU?





WHAT ISSUES DO YOU SEE?



UNAUTHORIZED PRACTICE OF LAW?



## WHAT CAN NONLAWYERS DO?

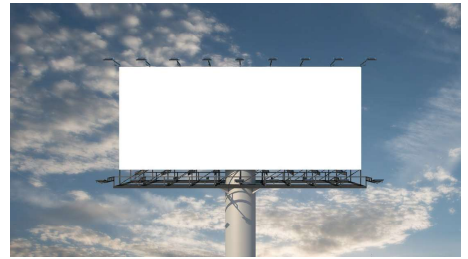
- [ABA Formal Op 506](#)



ADVERTISING??

RPC 7.1  
COMMUNICATIONS CONCERNING  
LAWYER'S SERVICES

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 contains a material misrepresentation of fact of law or omits a fact necessary to make the statement considered as a whole not materially misleading.



**RPC 7.2**  
**COMMUNICATION CONCERNING A LAWYER'S**  
**SERVICES: SPECIFIC RULES**

- (a) A lawyer may communicate information regarding the lawyer's services through any media.
- (b) A lawyer shall not compensate, give or promise anything of value to a person for recommending the lawyer's services except that a lawyer may:
  - (1) pay reasonable costs of advertisements or communications permitted under this rule;
  - (2) pay the reasonable costs of a legal services plan or not-for-profit or qualified lawyer referral service;
  - ...

## RPC 7.3 SOLICITATION OF CLIENTS

- (a) “Solicitation” or “solicit” denotes a communication initiated by or on behalf of a lawyer or law firm that is directed to a specific person the lawyer knows or reasonably should know needs legal services in a particular matter and that offers to provide, or reasonably can be understood as offering to provide, legal services for that matter.
- (b) A lawyer shall not solicit professional employment by live in person-to-person contact when a significant motive for the lawyer’s doing so is the lawyer’s doing so is the lawyer’s or law firm’s pecuniary gain, unless the contact is with a lawyer:
  - Lawyer;
  - Persons who has a family or close personal or prior business relationship;
  - Person who routinely uses for business purposes the type of legal services offered by the lawyer.

## RPC 7.3 SOLICITATION OF CLIENTS

- (c) A lawyer shall not solicit professional employment even when not otherwise prohibited by paragraph (b) if:
  - (1) the target of the solicitation has made known to the lawyer a desire not be solicited by the lawyer; or
  - (2) the solicitation involves coercion, duress or harassment.
- (d) This rule does not prohibit communications authorized by law or ordered by a court or other tribunal.
- (e) Notwithstanding the prohibitions in this Rule, a lawyer may participate with a prepaid or group legal service plan operated by an organization not owned or directed by the lawyer that uses live person-to-person contact to enroll members or sell subscriptions for the plan from persons who are not known to need legal services in a particular matter covered by the plan.

## CONCERNS ABOUT IN-PERSON SOLICITATION UNDER THE MODEL RULES

- Causes harm to the public
- Invasion privacy/privacy concerns
- Harder to say no
- No written record
- Makes enforcement of Rules harder
  
- **Relevant SCOTUS lawyer advertising cases**
- *NAACP v. Button*, 371 U.S. 415 (1963)(Constitutionally guaranteed individual freedoms can prevail over the state's interest in policing legal ethics.)
- *Brotherhood of Railroad Trainmen v. Virginia*, 377 U.S. 1 (1964)( Enforcement of federally granted rights cannot be a threat to legal ethics.)
- *United Mine Workers of America v. Illinois State Bar Ass'n*, 386 U.S. 941 (1967)(SCOTUS reversed holding of Il. Sup. Ct. that using non-attorney to process worker's compensation complaints and providing salaried attorney who did not get involved until appearance before commission was UPL. SCOTUS held that first amendment freedoms of speech, petition and assembly include right of labor union to have salaried attorney represent its union members.)
- *Ohralik/Primus* 1978 (decided same day-opposite results)

## SOME RELEVANT SCOTUS LAWYER ADVERTISING CASES

- *NAACP v. Button*, 371 U.S. 415 (1963)(Constitutionally guaranteed individual freedoms can prevail over the state's interest in policing legal ethics.)
- *Brotherhood of Railroad Trainmen v. Virginia*, 377 U.S. 1 (1964)( Enforcement of federally granted rights cannot be a threat to legal ethics.)
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- *In re Primus*, 436 U.S. 412 (1978) (Appeal of a disciplinary decision. SCOTUS held that solicitation of prospective litigants by nonprofit organizations where litigation is a form of political expression and political association constitutes expressive and associational conduct entitled to First Amendment protection.)

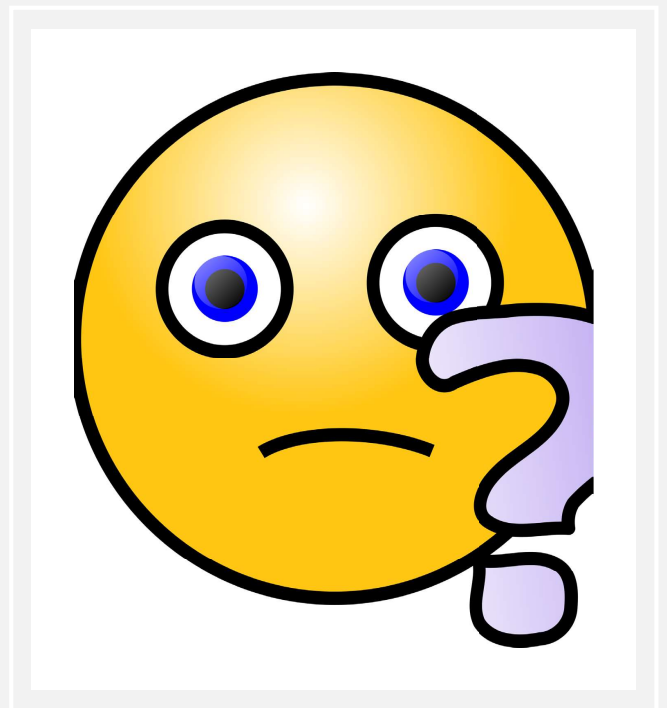


WHAT OTHER RULES OF PROFESSIONAL  
CONDUCT MIGHT APPLY TO AN ISSUE  
OF SOLICITATION?

Rule 5.3

Rule 7.3

Rule 8.4(a)



WHAT OTHER  
PROTECTION MUST  
BE UNDERSTOOD  
WHEN ANALYZING  
ISSUES OF  
SOLICITATION IN  
THE CONTEXT OF  
REPRESENTING  
UNION WORKERS?

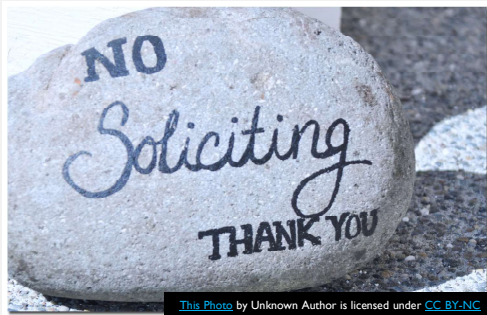
CONGRESS SHALL MAKE NO LAW *respecting*  
*an establishment of religion, or prohibiting the free*  
*exercise thereof; or abridging the freedom of speech,*  
*or of the press; or the right of the people peaceably*  
*to assemble, and to petition the Government for a*  
*redress of grievances.*

 **THE FIRST AMENDMENT**  
**TO THE U.S. CONSTITUTION**  
15 DECEMBER 1791

A LOOK AT HOW THE MODEL RULES  
DEFINE SOLICITATION?



## IS THIS SOLICITATION?



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- A lawyer obtains a list from the local sheriff of persons arrested within the last week, calls them on the telephone, and offers to provide general legal services. None of the arrestees are lawyers. The lawyer also does not personally or professionally know, nor is lawyer related to, any of the arrestees. Does the conduct violate Rule 7.3?

## SOLICITATION?

- A lawyer with direct supervision over a law firm's marketing department hires a professional lead generator to obtain client leads. The lawyer signs an agreement with the lead generator to pay a flat monthly fee for leads in mass tort cases. The agreement includes no information on how the lead generator obtains leads, nor does the lawyer provide any direction or limitation on how the lead generator does so. The lead generator pays its employees to "lurk" in online chat rooms set up for family members and survivors of aviation disasters, medical device and drug product liability matters, and other possible mass torts. The lead generator also pays its employees to research the family members and survivors and telephone those persons to inform them of the lawyer's experience and availability in mass tort cases. The lead generator also asks these same persons if they would like to be represented in their cases. The lawyer receives a report from the lead generator with a list of 10 new clients and says to the lead generator, "I don't know what you are doing, and I don't care! Keep 'em coming!" The lead generator responds, "We just call the people who are online discussing accidents." The lawyer does not inquire further, signs the clients sent by the lead generator, and continues to use the lead generator.
- Does the conduct violate any rules?

## ABA FORMAL OP. 501

- [What is solicitation](#)

## PART TWO HYPOTHETICAL WE-HAUL

Can counsel continue to represent the Union while also representing the individual workers in the wage and hour action?

Does counsel have any duties of disclosure or to seek consent to such representation in respect to either the Union or the workers?





## PART THREE OUR HYPOTHETICAL

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The organizers believe the workers desire union representation and the Union's officers decide to initiate an organizing drive among the workers. Does that change anything in respect to the lawyer's ethical obligations?

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As part of its effort to organize the workers, the Union demands that the Company remain neutral and not attempt to persuade the workers to vote "no." Does that change anything in respect to the lawyer's ethical obligations?

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The Union President meets with the owners of the Company. The Owner pleads poverty and says, "If the wage and hour suit went away, I could agree to neutrality." The President of the Union conveys that offer to counsel and indicates he would very much like to accept it. What are the lawyer's ethical obligations?

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The Union President instructs the lawyer to settle the wage and hour action. What are the lawyer's ethical obligations?





## JOINT REPRESENTATION ISSUES

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## CONFLICT OF INTEREST: CURRENT CLIENTS RULE 1.7

- What you can't do...

- Rule 1.7(a)
- (a) Except as provided in paragraph (b), a lawyer **shall** not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:
  - 
  - (1) the representation of one client will be **directly adverse** to another client; or
  - 
  - (2) there is a significant risk that the representation of one or more clients will be **materially limited** by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer



## RULE 1.7(B) HOW TO FIX IT

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

- (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
- (2) the representation is not prohibited by law;
- (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
- (4) each affected client gives informed consent, confirmed in writing.

# WHAT IS DIRECT ADVERSITY

- If while representing a client, a lawyer takes action that could directly harm a client that is direct adversity. [Think: is likely to make the client feel betrayed. Cmt 6]
- Direct adversity can occur even when the matters are wholly unrelated. (See cmt. 6)
- Can arise in transactional matters-e.g., lawyer asked to represent seller of business in negotiations with a buyer represented by the lawyer, not in that matter but in an unrelated matter, the lawyer could not undertake the representation without the informed consent of each client.



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## **MATERIALLY LIMITED**

- Focus is on extent to which quality of representation limited due to competing interests
- Conflict if there is a significant risk that L's ability to consider, recommend or carry out an appropriate course of action for C will be materially limited by L's other responsibilities or interests (Rule 1.7 Com. 8)

HOW DO YOU  
KNOW WHAT  
INFORMED IS?

The consent will not be effective if it is based on an inadequate understanding of the nature and severity of the lawyer's conflict, violates the law, or if client lacks capacity to consent.

The lawyer is responsible for assuring that each affected client has the necessary information to consent.



## **INFORMED CONSENT ADEQUATE DISCLOSURE**

- ▶ Identify clients
- ▶ Identify conflict and define in general terms and specific terms as to that client
- ▶ Identify matter and define nature and extent of rep
- ▶ Explain facts, legal implications and possible effects of proposed representation reasonably sufficiently to permit C to appreciate significant of L's rep of other C
- ▶ Define what will happen if conflict occurs and prepare exit strategy
- ▶ [www.freivogelonconflicts.com](http://www.freivogelonconflicts.com)



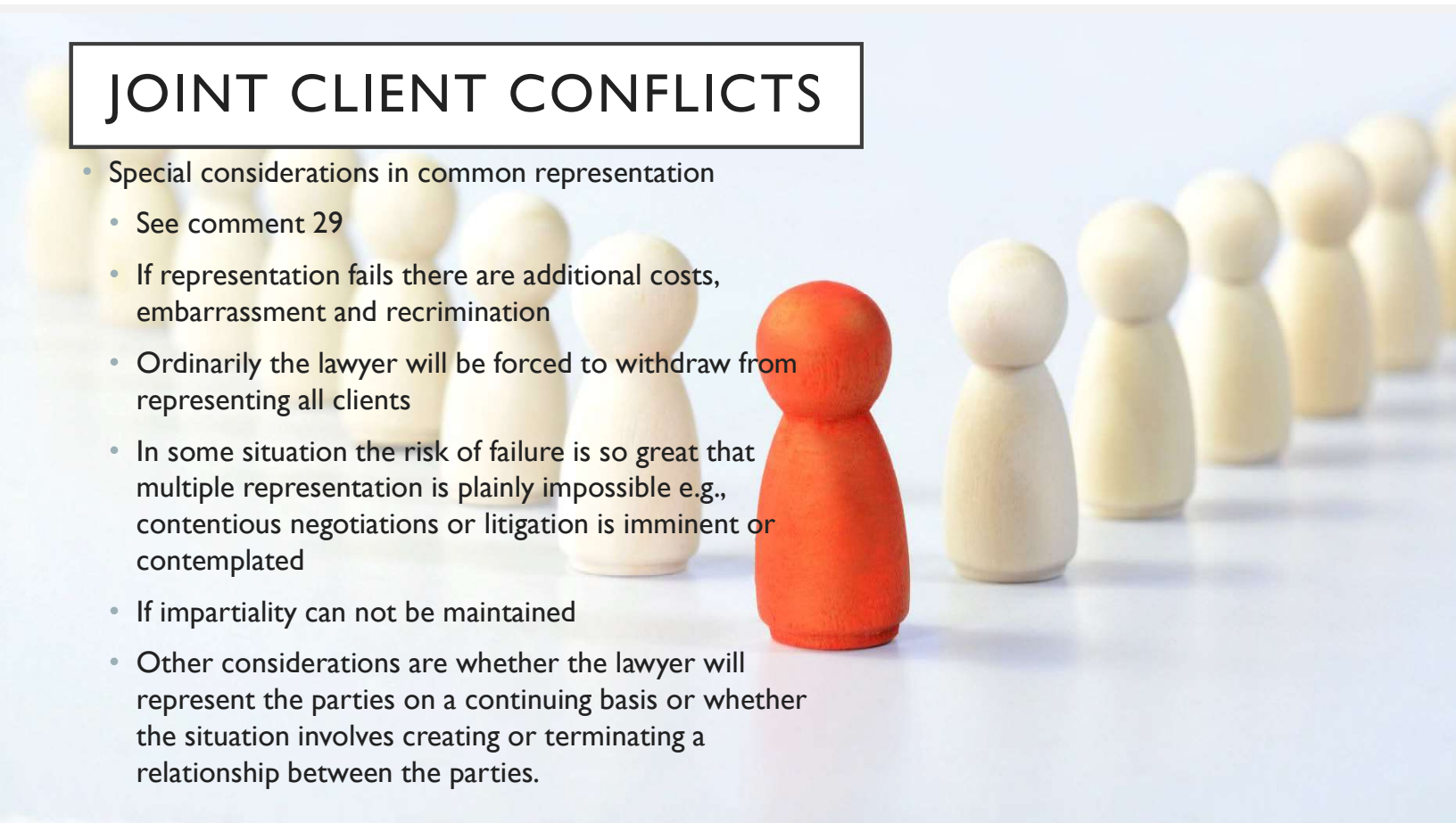
## JOINT CLIENT CONFLICTS

- Perhaps the most significant factor in determining appropriateness of common representation is effect on client-lawyer confidentiality and attorney-client privilege
- The prevailing rule is that there is no privilege between commonly represented clients. It must be assumed that if litigation eventuates between the clients the privilege will not protect any communication
- Likewise, there is no expectation of confidentiality in joint representation between the jointly represented clients



# JOINT CLIENT CONFLICTS

- Special considerations in common representation
  - See comment 29
  - If representation fails there are additional costs, embarrassment and recrimination
  - Ordinarily the lawyer will be forced to withdraw from representing all clients
  - In some situation the risk of failure is so great that multiple representation is plainly impossible e.g., contentious negotiations or litigation is imminent or contemplated
  - If impartiality can not be maintained
  - Other considerations are whether the lawyer will represent the parties on a continuing basis or whether the situation involves creating or terminating a relationship between the parties.



## PART FOUR OUR HYPOTHETICAL

- Counsel continues to represent the workers in the FLSA action. After an all staff meeting at We-haul, one of the workers goes into the office of the Company's HR Director and finds payroll records showing both which workers worked more than 40 hours per week, and that those workers were not paid at overtime rates.
- The worker copies the records on the Company's copy machine, takes the copies out of the office, and gives the copies to the lawyer.
- What ethical responsibilities does the lawyer have with respect to the copies and the worker?



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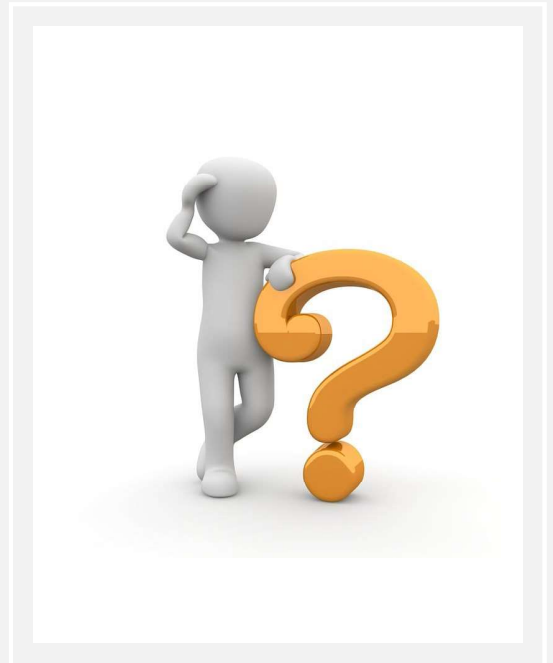
## PART FOUR (CONT'D) OUR HYPOTHETICAL

- Another worker, in an effort to assist the lawyer with the case, engages the Company's owner in conversation about the matter while surreptitiously placing her cell phone of record. The owner states that he knows the law requires payment of overtime, but "I don't have the money and you and the rest of them are lucky to have a job anyway." That statement is clearly relevant to proving any violation of the law was willful. The worker emails the recording to the lawyer. State law makes it illegal to record a conversation without both parties' consent.
- What ethical obligations does the lawyer have in respect to the recording and the worker?



WHAT ETHICAL OBLIGATION DOES THE LAWYER HAVE  
IN RESPECT TO THE COPIES AND THE WORKER?

- Can the lawyer keep the copies?
- Can the lawyer use the copies?
- What should the lawyer do?





- Rule 1.2(d) A lawyer shall not counsel a client to engage, or assist a client, in conduct the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope meaning or application of the law.
- Rule 1.6-All information relating to the representation is confidential
- Rule 4.2 Communication with Person Represented by Counsel
- Rule 4.4 In representing a client, a lawyer shall not...use methods of obtaining evidence that violate the legal rights of such a person
- Rule 8.4-A lawyer shall not engage in conduct involving dishonesty, fraud, deceit or misrepresentation

QUESTIONS?

Thank You!

