

EXAMINERS' ANALYSIS OF QUESTION 8

The business transactions between Lawyer and his clients are covered by Michigan Rule of Professional Conduct (MRPC) 1.8(a) .

MRPC 1.8(a) provides:

A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security, or other pecuniary interest adverse to a client unless:

- (1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing to the client in a manner that can be reasonably understood by the client;
- (2) the client is given a reasonable opportunity to seek the advice of independent counsel in the transaction; and
- (3) the client consents in writing thereto.

A client's loan to a lawyer is a transaction that is covered by this rule.'

(1) *Client A:*

The terms of the transaction with Client A are not fair and reasonable to the client. The interest rate is low and the repayment of the loan is unsecured. While the fairness and reasonableness of the interest rate may depend upon the other options available to the client for a return on investment of \$30,000, the fact that the going rate for such loans was higher

¹ See ABA comment for portion of MRPC 1.8(a) that is identical to the Model. See also, Jane Massey Draper, B.C.L., Annotation, *Disciplinary Action Against Attorney Taking Loan From Client*, 9 ALR 5th 193, 209-10 (1993); *Grievance Administrator v Eugene F. Williams*, DP 197/85 (ADB 1987) (Michigan Attorney Discipline Board opinion applying DR 5-104(A), predecessor to MRPC 1.8[a]).

should have affected the terms, i.e., the client should have received more interest. Also, regular payments before a balloon payment at the end would arguably be better for the client, especially in light of the other easy terms. Most important, however, is that the client's interests are unprotected because no collateral secures repayment of the loan.²

Additional points may be awarded to the candidate who discusses whether the minimal promissory note described in the question satisfies the requirement that the "transaction and terms" be "fully disclosed and transmitted in writing to the client in a manner that can be reasonably understood by the client." MRPC 1.8(a)(1). Merely disclosing the actual terms in the promissory note may be compliant with a technical reading of the rule. But disclosing the prevailing rates and the risk the client was taking by not having the loan collateralized would be more consonant with the purposes of "full" disclosure fostering client understanding of the transaction. A candidate may argue that the rule, as written, could be interpreted either way. Accordingly, spotting the issue and discussing it well should be recognized. (A similar discussion might occur in connection with the analysis of "consent" versus "informed consent" -- see discussion of the third element below.)

A reasonable opportunity to seek the advice of independent counsel as to the transaction must be afforded to the client. From the facts presented in the question, a candidate should at least raise the question whether the client had a reasonable opportunity to discuss the transaction with independent counsel. The solicitation for the loan and the client's assent happened almost instantly, and a promissory note was given for the cash the next morning because Lawyer wanted to move quickly. Points may be awarded for the candidate who recognizes that Michigan's rule, unlike the Model Rule, does not require that the client be "advised in writing of the desirability of seeking" counsel.

The final element of the rule is that "the client consents in writing thereto," i.e., to the terms of the transaction. Clearly, this element has not been met. There were no loan documents other than the promissory note, and the question

² Compare, *Office of Disciplinary Counsel v Battistelli*, 193 W Va 629, 631; 457 SE2d 652 (1995).

mentions nothing about a letter or other writing by Lawyer disclosing the terms of the transaction that Client could countersign or acknowledge. Again, some candidates may note that the Michigan Rule differs from the ABA Model Rule in that it does not require "informed consent." Requiring informed consent would have required Lawyer to discuss risks and reasonable alternatives to the terms he proposed. See Model Rule 1.0(e).³

(2) Client B:

MRPC 1.8(a) does not apply to Lawyer's purchases at Hardware Barn. The comments to the Michigan and Model Rule 1.8 explain why these ordinary transactions do not constitute "business transactions" with a client under the rule:

Paragraph (a) does not, however, apply to standard commercial transactions between the lawyer and the client for products or services that the client generally markets to others, for example, banking or brokerage services, medical services, products manufactured or distributed by the client, and utilities' services. In such transactions, the lawyer has advantage no dealing with the client, in and the restrictions in paragraph (a) are unnecessary and impracticable.

Nothing in the question suggests that Lawyer did anything but select merchandise and pay the prices marked on the items. Lawyer's purchases were standard commercial transactions and none of the strictures of MRPC 1.8(a) apply here.

(3) Marketing via Mailers:

³

ABA Model Rule 1.0(e) provides: "Informed consent" denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.

Lawyer may select coupon option 1. Option 2 violates the Rules of Professional Conduct. This question is answered by reference to MRPC 7.2(c) and MRPC 5.4(a).

Michigan Rule of Professional Conduct 7.2(c) provides, in pertinent part, that:

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

(i) pay the reasonable cost of advertising or communication permitted by this rule;

Option I is permissible under MRPC 7.2(c)(i). Lawyer is only paying the marketing firm the reasonable cost of the advertisement being mailed. Option 2, however, violates MRPC 7.2(c)(i) because the marketing firm is being paid a percentage of the fees paid by the client for the Lawyer's services. This, by definition, exceeds the reasonable cost of advertising or communication; the compensation to the advertising firm is tied not to its work, but to the fees generated by the flyer or coupon's use. This also constitutes a violation of MRPC 5.4(a) ("lawyer or law firm shall not share legal fees with a nonlawyer," except in certain circumstances not relevant here). Note that the increased cost to Lawyer for an exclusive placement in the mailer may not necessarily amount to a violation of MRPC 7.2(c). Such a higher payment may still fall within the "reasonable cost of advertising or communication," especially since the marketing firm will forego revenue from other attorneys in that mailer. But, this increased charge is not a violation of MRPC 5.4(a) as it is in no way tied to the attorney fees generated.

The question does not implicate MRPC 7.1 (false or misleading advertising, unjustified expectations, or unwarranted comparisons). Nor does the question involve a solicitation prohibited by MRPC 7.3(a); the mailing is a general advertising circular. Finally, the coupon(s) can be read to communicate Lon Lawyer's areas of practice, which is acceptable under MRPC 7.4.