

## MPRE PRACTICE QUESTIONS: A PRACTICE IN ANALYSIS

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EXPLANATIONS WRITTEN BY LAWTUTORS  
QUESTIONS ARE ACTUAL PAST MPRE QUESTIONS

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### Question # 1

An attorney represented the wife in an acrimonious divorce proceeding involving issues of property division and child custody. After one day of trial, the husband, through his lawyer, made a settlement offer. The proposed settlement required that the wife's attorney agree not to represent the wife in any subsequent proceeding, brought by either party, to modify or enforce the provisions of the decree. The wife wanted to accept the offer, and her attorney reasonably believed that it was in the wife's best interest to do so because the settlement offer was better than any potential award to the wife resulting from the case going to judgment. Consequently, the attorney recommended to the wife that she accept the offer.

Was it proper for the wife's attorney to recommend that the wife accept the settlement offer?

- (A) No, because the attorney did not obtain the wife's informed consent to the conflict of interest created by the proposed settlement.
- (A) Incorrect. The issue with the proposed settlement is not that it creates a conflict of interest (see Model Rule 1.7 detailing the situations creating a conflict of interest for current clients), but rather that it creates an impermissible restriction on the attorney's future right to practice.
- (B) No, because the proposed settlement restricted the attorney's right to represent the wife in the future.
- (B) Correct. Comment 2 to Model Rule 5.6 explicitly prohibits an attorney from making or offering an agreement in which a restriction on the lawyer's right to practice is part of the settlement of a client controversy.
- (C) Yes, because the restriction on the attorney was limited to subsequent proceedings in the same matter.
- (C) Incorrect. Model Rule 5.6(b) and Comment 2 prohibit any restriction on an attorney's right to practice, no matter how small.
- (D) Yes, because the attorney reasonably believed that it was in the wife's best interest to accept the proposed settlement.
- (D) Incorrect. Whether the attorney reasonably believed accepting the settlement offer to be in his client's best interest is irrelevant, the issue is the term contained in the settlement restricting the attorney's right to practice.

### Question # 2

An experienced oil and gas developer asked an attorney to represent him in a suit to establish the developer's ownership of certain oil and gas royalties. The developer did not have available the necessary funds to pay the attorney's reasonable hourly rate for undertaking the case and proposed instead that, if he prevailed in the lawsuit, he would pay the attorney 20% of the first year's royalties recovered in the suit. Twenty percent of the first year's royalties would likely exceed the amount that the attorney would have received from charging his regular hourly rate. The attorney accepted the proposal.

Is the attorney subject to discipline?

- (A) Yes, because the agreement gave the attorney a proprietary interest in the developer's cause of action.

(A) Incorrect. Model Rule 1.8(i) prohibits attorneys from acquiring proprietary interests in the subject of litigation, but carves out exceptions for reasonable contingent fees in civil cases and liens authorized by law. The reasonable contingent fee exception applies here (see answer (B) for discussion of reasonableness).

(B) Yes, because the fee was likely to exceed the amount that the attorney would have received from charging his regular hourly rate.

(B) Incorrect. Model Rule 1.5 lists eight factors to be considered in determining reasonableness of a fee agreement. One of the factors is whether the fee agreement is fixed or contingent, but the proportion of the contingent fee to the attorney's normal hourly fee is not one of the factors. Percentage caps on contingent fees may be fixed by local laws, but the question here does not mention such, therefore it is presumptively reasonable.

(C) No, because the developer rather than the attorney proposed the fee arrangement.

(C) Incorrect. Neither Rule 1.5 nor Rule 1.8 attribute any relevance to whether the attorney or the client propose a contingent fee agreement giving the attorney a proprietary interest in the subject matter of the litigation.

(D) No, because the attorney may contract with the developer for a reasonable contingent fee.

(D) Correct. Model Rule 1.8(i) specifically allows attorneys to acquire an interest in the subject matter of the litigation if that interest comes as the result of a contingent fee in a civil case. That is the case here, therefore it is permissible.

### Question # 3

An attorney represents a company that produces chemical products. Some of the waste products of the company's manufacturing processes are highly toxic and are reasonably certain to cause substantial bodily harm if disposed of improperly. The president of the company recently informed the attorney that a new employee mistakenly disposed of the waste products in the ground behind the company plant, an area that is part of the source of the city's water supply. The attorney advised the president that, although the conduct was not criminal, the company could be civilly liable for negligence in lawsuits brought by any persons harmed by the waste products. The attorney advised the president to immediately report the problem to city authorities. Fearful of adverse publicity, the president declined to do so. The attorney further advised the president that she believed the president's decision was immoral. The president continued to decline to report the matter. The attorney then informed the president that she was withdrawing from the representation and would inform the authorities herself. Immediately after withdrawing, the attorney reported the company's conduct to the authorities.

Is the attorney subject to discipline?

(A) Yes, because the information was given to the attorney in confidence and may not be revealed without the client's consent.

(A) Incorrect. While any information communicated by a client to an attorney in the scope of representation is confidential, this disclosure is impliedly authorized by Model Rule 1.6 (b) to prevent reasonably certain death or substantial bodily harm.

(B) Yes, because the company's conduct was not criminal.

(B) Incorrect. Model Rule 1.6 (b) does not limit disclosures to criminal conduct, but rather to those necessary to prevent reasonably certain death or substantial bodily harm, regardless of criminal liability.

(C) No, because the attorney reasonably believed that the company's disposal of the waste products was reasonably certain to cause substantial bodily harm.

(C) Correct. Rule 1.6(b) permits an attorney to disclose confidential information related to the representation of a client if the attorney believes the disclosure necessary to prevent reasonably certain death or substantial bodily harm. Contamination of a water supply is a sufficient threat of substantial bodily harm to allow the disclosure.

(D) No, because the attorney reasonably believed that the president was pursuing an imprudent course of conduct.

(D) Incorrect. An attorney's belief in the prudence of a client's course of conduct is irrelevant to the analysis of when an attorney may make disclosures of confidential information under Rule 1.6.

#### Question # 4

An attorney worked in the legal department of a public utility company and represented that company in litigation. The company was sued by a consumer group which alleged that the company was guilty of various acts in violation of its charter. Through its general counsel, the company instructed the attorney not to negotiate a settlement but to go to trial under any circumstances since a precedent needed to be established.

Although the company's defense could be supported by a good faith argument, the attorney believed that the case should be settled if possible.

Must the attorney withdraw as counsel in this case?

(A) No, because as an employee, the attorney is bound by the instructions of the general counsel.

(A) Incorrect. Model Rule 1.2 requires an attorney to abide by the decision of her client on whether to settle. However, 1.16 details three instances requiring an attorney's immediate withdrawal from representation, (1) when the continued representation will result in a violation of the RPC or other law; (2) when the lawyer's physical or mental condition impairs her ability to effectively represent the client; or (3) when discharged. As none of these exceptions apply here, the attorney is not required to withdraw.

(B) No, because the company's defense can be supported by a good faith argument.

(B) Correct. Model Rule 3.1 prohibits attorneys from bringing cases lacking a good faith basis in law or fact for the argument. Because the facts here state that the company's defense could be supported by a good faith argument, the case is proper and does not require the attorney to withdraw.

(C) Yes, because a lawyer should endeavor to avoid litigation.

(C) Incorrect. Model Rule 1.2 requires an attorney to abide by the decision of her client on whether to accept settlement of a case or go to trial.

(D) Yes, because the company is controlling the attorney's judgment in settling the case.

(D) Incorrect. Subject to two exceptions (c) and (d), Rule 1.2 requires attorneys to abide by the client's objectives in the representation, and specifically the client's decision whether or not to settle.

#### Question # 5

An attorney represented a client who was the plaintiff in a personal injury action. The personal injury action was settled, and the attorney received a check in the amount of \$10,000 payable to the attorney. The attorney deposited the check in her clients' trust account.

One day later, the attorney received a letter from a bank, which had heard of the settlement of the personal injury lawsuit. The bank informed the attorney that the client had failed to make his monthly mortgage payments for the last three months and demanded that the attorney immediately release \$900 of the proceeds of the settlement to

the bank or the bank would institute mortgage foreclosure proceedings against the client. The attorney informed the client of the bank's letter. The client did not dispute the \$900 debt to the bank, but responded:

"I don't care what the bank does. The property is essentially worthless, so let the bank foreclose. If the bank wants to sue me, I'll be easy enough to find. I don't think they'll even bother. You just take your legal fees and turn the rest of the proceeds over to me."

Is the attorney subject to discipline if she follows the client's instructions?

(A) Yes, because the client did not dispute the \$900 debt to the bank.

(A) Incorrect. Whether or not the client disputed the bank's claim of his debt is irrelevant. Model Rule 1.15(d) requires attorneys in receipt of client funds to immediately notify the client of their receipt and promptly deliver to the client the funds he is entitled to receive. While paragraph (e) of Rule 1.15 states an exception to this rule for property in which two or more people claim interests, here, the bank does not claim a lien or judgment allowing attachment of this money, so the ownership of the settlement funds are not at issue and the lawyer is not subject to punishment for disbursing them to the client.

(B) Yes, because the attorney knows that the client is planning to force the bank to sue him.

(B) Incorrect. While comment 4 to Rule 1.15 contemplates that attorneys may have some obligations to protect property in his custody from wrongful interference by the client, forcing a bank to sue for a judgment against him is not wrongful and thus the attorney has no duty to the bank.

(C) No, because the attorney did not represent the client in the mortgage matter.

(C) Incorrect. Whether or not the attorney represented the client in the mortgage giving rise to the client's alleged debt to the bank is irrelevant. Rule 1.15 is only concerned with third parties' lawful interests in the property at issue and any unlawful attempts of the client to avoid payment of debts in determining when an attorney must disburse client funds to a third party.

(D) No, because the bank has no established right to the specific proceeds of the client's personal injury judgment.

(D) Correct. While the bank may have a right to seek collection of a debt from the client, Rule 1.15 (and Comment 4) only requires the attorney to turn over funds to a third party who has a lawful right to the specific funds or property in the attorney's possession by way of judgment, lien, or some other legal vehicle.

### Question # 6

An attorney represented a client in an action against the client's former business partner to recover damages for breach of contract. During the representation, the client presented the attorney with incontrovertible proof that the partner had committed perjury in a prior action that was resolved in the partner's favor. Neither the attorney nor the client was involved in any way in the prior action. The attorney believes that it would be detrimental to the client's best interests to reveal the perjury because implications might be drawn from the former close personal and business relationship between the client and the partner.

Is it proper for the attorney to disclose the perjury to the tribunal?

(A) No, because the attorney believes that the disclosure would be detrimental to the client's best interests.

(A) Correct. Model Rule 1.8(b) prohibits attorneys from using information related to the representation of a client to the disadvantage of the client without the client's informed consent. Here, the lawyer believes the disclosure would disadvantage his client and there is no mention of informed consent, therefore, the disclosure would be improper.

(B) No, because neither the client nor the attorney was involved in the prior action.

(B) Incorrect. Model Rule 1.6 governing disclosure of confidential information generally prohibits disclosure of confidential information related to representation of a client, but will allow such disclosures to prevent or mitigate substantial financial injury as a result of the *client's* past or future crime or fraud. Here, because a third party committed the crime, and as discussed in answer (A) the disclosure would likely disadvantage the client, the lawyer may not reveal the information.

(C) Yes, because the attorney has knowledge that the partner perpetrated a fraud on the tribunal.

(C) Incorrect. Model Rule 3.3 governs candor toward the tribunal. Rule 3.3 (a)(1) and (a)(3) require the attorney to correct any statements of fact by the attorney or his witnesses he later comes to know to be false, this duty does not extend beyond the conclusion of the proceeding at issue (§(c), Comment 13) nor does it cover known false disclosures in prior, unrelated proceedings.

(D) Yes, because the information is unprivileged.

(D) Incorrect. The lawyer's duty of confidentiality laid out in Rule 1.6 extends much further than that of the attorney client privilege, and prevents disclosure of *any* information relating to the representation of the client, subject to the rule's enumerated exceptions.

#### Question # 7

An attorney was engaged under a general retainer agreement to represent a corporation involved in the uranium industry. Under the agreement, the attorney handled all of the corporation's legal work, which typically involved regulatory issues and litigation.

The corporation told the attorney that a congressional committee was holding hearings concerning the extent of regulation in the copper industry. Because the corporation was considering buying a copper mine during the next fiscal year, the corporation asked the attorney to appear and testify that the industry was over regulated. The attorney subsequently testified to that effect before the relevant congressional committee. The attorney registered his appearance under his own name and did not disclose that he was appearing on behalf of a client. Afterward, the attorney billed the corporation for fees and expenses related to his testimony. The attorney's testimony was truthful.

Was the attorney's conduct proper?

(A) Yes, because the duty of confidentiality prevented the attorney from disclosing the identity of his client.

(A) Incorrect. Model Rule 3.9 requires attorneys representing clients in non-adjudicative proceedings to inform the agency or legislative body that their appearance is in a representative capacity. Rule 3.9 also requires attorneys in such proceedings conform to Rules 3.3 (a) through (c), 3.4 (a) through (c), and 3.5. Rule 3.3 (a)(1) prohibiting attorneys from making or failing to correct false statements of material fact operates here to prohibit the attorney from making the impression that his testimony is on his own behalf rather than that of his client.

(B) Yes, because the attorney-client evidentiary privilege prevented disclosure of the identity of his client in this context.

(B) Incorrect. The evidentiary attorney-client privilege applies only in judicial or legal proceedings, not the legislative or administrative proceedings at issue here.

(C) No, because the attorney failed to disclose that he was appearing and testifying in a representative capacity.

(C) Correct. Model Rule 3.9 requires attorneys representing clients in non-adjudicative proceedings to inform the agency or legislative body that their appearance is in a representative capacity.

(D) No, because the attorney accepted compensation in return for his testimony.

(D) Incorrect. Model Rule 3.9 makes no distinction about its application to compensated or pro bono clients, therefore, the rule still applies here.

### Question # 8

An attorney represented a plaintiff in a civil suit against a defendant, who was also represented by a lawyer. In the course of developing the plaintiff's case, the attorney discovered evidence that she reasonably believed showed that the defendant had committed a crime. The attorney felt that the defendant's crime should be reported to local prosecutorial authorities. After full disclosure, the plaintiff consented to the attorney's doing so. Without advising the defendant's lawyer, the attorney informed the local prosecutor of her findings, but she sought no advantage in the civil suit from her actions. The defendant was subsequently indicted, tried, and acquitted of the offense.

Was the attorney's disclosure to prosecutorial authorities proper?

(A) Yes, because the attorney reasonably believed that the defendant had committed a crime.

(A) Correct. While this answer is not perfectly correct, by process of elimination it is the most correct. Model Rule 1.6 permits disclosures of privileged information with the client's informed consent or in certain enumerated circumstances. Here, because the client gave informed consent, the disclosure is permissible. Note, Rule 1.6 (b) does not apply here as the client did not commit the crime.

(B) Yes, because the attorney was required to report unprivileged knowledge of criminal conduct.

(B) Incorrect. Communications made to enable the commission of what a client knew or should have known were a crime or fraud are excepted from attorney-client privilege, but as this evidence is of a third party's crime, that exception is not relevant. Moreover, Rule 1.6 permits but never *requires* disclosure of confidential information related to representation of a client.

(C) No, because the attorney did not know that the defendant had committed a crime.

(C) Incorrect. Whether the attorney knew or simply thought the defendant committed a crime is irrelevant, the important question is whether the client provided informed consent to the disclosure as discussed in answer (A).

(D) No, because the plaintiff's civil suit against the defendant was still pending.

(D) Incorrect. Rule 1.6 makes no reference to the appropriate timing for attorneys to make disclosures of confidential information. Here, the only relevant question is whether the attorney obtained the client's informed consent.

### Question # 9

A law firm has 300 lawyers in 10 states. It has placed the supervision of all routine administrative and financial matters in the hands of a nonlawyer administrator. The administrator is paid a regular monthly salary and a year-end bonus of 1% of the law firm's net income from fees. Organizationally, the administrator reports to the managing partner of the law firm. This partner deals with all issues related to the law firm's supervision of the practice of law. The administrator has access to client files but does not have control over the professional judgment of the lawyers in the firm.

Is it proper for the partner to participate in the law firm's use of the administrator's services in this fashion?

(A) No, because the administrator has access to client files.

(A) Incorrect. Comment 2 to Model Rule 5.3 (Responsibilities Regarding Non-Lawyer Assistance) specifically contemplates that lawyers in firms will and can properly share access to client files with non-lawyers. The supervising attorneys merely need to ensure the non-lawyers are in compliance with all ethical obligations required of the attorneys.

(B) No, because the law firm is assisting a nonlawyer in the unauthorized practice of law.

(B) Incorrect. The question clearly states that the non-lawyer supervises only administrative and financial matters, and has no control over the professional judgement of the lawyers in the firm.

(C) No, because the law firm is sharing legal fees with a nonlawyer.

(C) Incorrect. Model Rule 5.4(a)(3) allows sharing of legal fees with non-lawyers as part of a compensation or retirement plan, so long as the non-lawyer has no control over the lawyers' professional judgment (Comment 1). Here, as it is clear the administrator has no influence on the attorneys' professional judgment, the compensation plan is appropriate.

(D) Yes, because the administrator does not control the professional judgment of the lawyers in the firm.

(A) Correct. Model Rule 5.4(a)(3) allows sharing of legal fees with non-lawyers as part of a compensation or retirement plan, so long as the non-lawyer has no control over the lawyers' professional judgment (Comment 1).

#### Question # 10

An attorney who had represented a client for many years prepared the client's will and acted as one of the two subscribing witnesses to its execution. The will gave 10% of the client's estate to the client's housekeeper, 10% to the client's son and sole heir, and the residue to charity. Upon the client's death one year later, the executor named in the will asked the attorney to represent him in probating the will and administering the estate. At that time, the executor informed the attorney that the son had notified him that he would contest the probate of the will on the grounds that the client lacked the required mental capacity at the time the will was executed. The attorney believes that the client was fully competent at all times and will so testify, if called as a witness. The other subscribing witness to the client's will predeceased the client.

Is it proper for the attorney to represent the executor in the probate of the will?

(A) Yes, because the attorney is the sole surviving witness to the execution of the will.

(A) Incorrect. If anything, the fact that the attorney is the sole surviving witness to the execution of the will makes it more improper for him to represent the executor. Regardless, Model Rule 3.7 prohibits attorneys from acting as advocates in matters where the lawyer will be called as a witness. Here, as the decedent's mental capacity when executing the will is at issue, and as the lawyer is the only surviving witness to the will's signing, the lawyer will almost certainly be called as a witness.

(B) Yes, because the attorney's testimony will support the validity of the will.

(B) Incorrect. Again, see Model Rule 3.7. Because the attorney will be called as a witness, he may not represent the executor.

(C) No, because the attorney will be called to testify on a contested issue of fact.

(C) Correct. Model Rule 3.7 prohibits attorneys from acting as advocates in matters where the lawyer will be called as a witness. Here, as the decedent's mental capacity when executing the will is at issue, and the lawyer served as a

witness to the will's signing, the lawyer is likely to be called as a witness and therefore cannot act as an advocate for the executor.

(D) No, because the attorney will be representing an interest adverse to the interests of the client's heir.

(D) Incorrect. The lawyer owes no duty to the client's heir. Rule 1.9 prohibits the attorney from representing 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, but says nothing of the heirs of former clients.

### Question # 11

An attorney has experienced several instances in which clients failed to pay their fees in a timely manner when it was too late in the representation to withdraw without prejudicing the clients. To avoid a recurrence of this situation, the attorney has drafted a stipulation of consent to withdraw if fees are not paid according to the fee agreement. She proposes to have all clients sign the stipulation at the outset of the representation. Clients will be provided an opportunity to seek independent legal advice before signing the stipulation.

Is it proper for the attorney to use the stipulation to withdraw from representation whenever a client fails to pay fees?

(A) Yes, because a lawyer may withdraw when the financial burden of continuing the representation would be substantially greater than the parties anticipated at the time of the fee agreement.

(A) Incorrect. Model Rule 1.16(b)(6) allows attorneys to withdraw when the financial burden upon the attorney is unreasonable, but makes no mention of the relationship of the burden to that anticipated at the time of entering the fee agreement.

(B) Yes, because the clients will have consented to the withdrawal in the stipulation.

(B) Incorrect. Although Model Rule 1.16(b)(5) permits withdrawal when a client has failed to fulfill a substantial obligation to the attorney and has reasonable notice that the lawyer may withdraw, the attorney is still subject to applicable law on notice to a tribunal of withdrawal and may be ordered to continue representation by the tribunal notwithstanding the client's outstanding financial obligations (Rule 1.16(c)).

(C) Yes, because clients will be provided an opportunity to seek independent legal advice before signing the stipulation.

(C) Incorrect. Independent legal advice on the stipulation does not except such agreements from the requirements of Rule 1.16(c), and as such attorneys must comply with court orders to continue representation of clients regardless of good cause for withdrawal under 1.16(b).

(D) No, because a client's failure to pay fees when due may be insufficient in itself to justify withdrawal.

(D) Correct. As discussed in answers (B) and (C), it is at the discretion of the tribunal to be determined on a case by case basis in accordance with its own rules on attorney withdrawal when an attorney may withdraw.

### Question # 12

An attorney has a highly efficient staff of paraprofessional legal assistants, all of whom are graduates of recognized legal assistant educational programs. Recently, the statute of limitations ran against a client's claim when a legal assistant negligently misplaced the client's file and suit was not filed within the time permitted by law.

Which of the following correctly states the attorney's professional responsibility?

(A) The attorney is subject to civil liability and is also subject to discipline on the theory of respondeat superior.

(A) Incorrect. The theory of respondeat superior creates civil liability for the attorney for the torts of his employees. Model Rule 5.3, however, only subjects attorneys to discipline when they fail to properly supervise subordinates, order, ratify, or fail to mitigate the consequences of a subordinate's conduct in violation of the Model Rules.

(B) The attorney is subject to civil liability or is subject to discipline at the client's election.

(B) Incorrect. The client may choose to bring a civil suit against the attorney under the theory of respondeat superior, however, as per Rule 8.5, attorney discipline is at the discretion of the jurisdiction(s) with authority and not at the discretion of the client.

(C) The attorney is subject to civil liability but is NOT subject to discipline unless the attorney failed to adequately supervise the legal assistant.

(C) Correct. As discussed in answer (A), Model Rule 5.3 subjects attorneys to discipline for the actions of their subordinates when they order, ratify, or fail to mitigate the consequences of the subordinate's conduct in violation of the Model Rules, or for failing to properly supervise subordinates. Here, only improper supervision fits with the facts, therefore, this is the only way the attorney could be subject to discipline.

(D) The attorney is NOT subject to civil liability and is NOT subject to discipline if the attorney personally was not negligent.

(D) Incorrect. Respondeat superior subjects the attorney to civil liability for the negligence of his employees and Model Rule 5.3 may subject the attorney to discipline for improper supervision.

### Question # 13

An attorney is a general practitioner with extensive experience in personal injury litigation. The attorney has also handled legal malpractice cases, but does not hold herself out to be experienced in such cases. A man contacted the attorney by telephone and asked her to represent him in a legal malpractice case that he wanted to file against the lawyer who had handled his divorce. The attorney refused even to meet with the man, saying that she was troubled by how high malpractice insurance premiums were getting and was not going to take any new legal malpractice cases. She did not offer to refer the man to other lawyers who took legal malpractice cases.

The man tried to contact several other lawyers, each of whom indicated that he or she would be happy to accept the representation but was too busy to take on any new matters. Six months later the statute of limitations expired without the man filing his lawsuit.

If the man can establish that a legal malpractice action against the divorce lawyer would have succeeded, is the attorney subject to civil liability for refusing to accept the representation?

(A) Yes, because the attorney did not have good cause to refuse the representation.

(A) Incorrect. Generally, attorneys have no duty to take on cases from any prospective client. Comment 1 to Model Rule 1.16 on duties to prospective clients make it clear that even after an initial consultation, an attorney has no duty to do anything further and may refuse to represent any client with or without cause.

(B) Yes, because the attorney did not make reasonable efforts to find a competent lawyer to represent the man.

(B) Incorrect. Once again, the lawyer has no duty to the prospective client, including no duty to find competent counsel.

(C) No, because the attorney does not hold herself out as experienced in legal malpractice cases.

(C) Incorrect. How the attorney holds herself out is irrelevant to the question of her duty to a prospective client, which is none. Comment 2 to Rule 1.16 makes a distinction between clients responding to attorneys' advertisements of their services (not a consultation) and clients actually discussing the possibility of representation with attorneys (a consultation) with respect to duty to prospective clients, but this does not occur in the fact pattern here.

(D) No, because the attorney had no legal obligation to accept the man's case.

(D) Correct. The very limited duties owed to prospective clients are detailed in Rule 1.16 but an attorney is always free to decline representation for any reason.

#### Question # 14

An attorney and her client entered into a written retainer and hourly fee agreement requiring the client to pay \$5,000 in advance of any services rendered by the attorney and requiring the attorney to return any portion of the \$5,000 that was not earned. The agreement further provided that the attorney would render monthly statements and withdraw her fees as billed. The agreement was silent as to whether the \$5,000 advance was to be deposited in the attorney's clients' trust account or in a general account. The attorney deposited the \$5,000 in her clients' trust account, which also contained funds that had been entrusted to the attorney by other persons. Thereafter, the attorney sent the client periodic accurate billings, showing the services rendered and the balance of the client's fee advance. The attorney did not withdraw any of the \$5,000 advance until one year later when the matter was concluded to the client's complete satisfaction. At that time, the attorney had billed the client reasonable legal fees of \$4,500. The attorney wrote two checks on her clients' trust account: one to herself for \$4,500, which she deposited in her general office account, and one for \$500 to the client. Was the attorney's conduct proper?

(A) Yes, because the attorney deposited the funds in her clients' trust account.

(A) Incorrect. Model Rule 1.15 requires that attorneys keep their funds and the funds of each of their clients in separate accounts in the state where the attorney's office is located. The attorney initially acted properly by depositing the funds into a client trust account, but upon each billing, should have withdrawn her own funds from the client's account.

(B) Yes, because the attorney rendered periodic and accurate billings.

(B) Incorrect. Rendering billings is not sufficient to comply with the requirements of Rule 1.16 for holding client funds. Client funds must be kept separate from attorney funds at all times.

(C) No, because the attorney's failure to withdraw her fees as billed resulted in an impermissible commingling of her funds and the client's funds.

(C) Correct. Rule 1.15(b) says lawyers may only commingle their funds with that of their clients in order to pay bank service charges on client trust accounts.

(D) No, because the attorney required an advance payment against her fee.

(D) Incorrect. Rule 1.15(c) allows attorneys to accept and hold client fees paid in advance, but requires that the attorney withdraw her fees as she earns them.

**Question # 15**

A wife retained an attorney to advise her in negotiating a separation agreement with her husband. Even though he knew that his wife was represented by the attorney, the husband, who was not a lawyer, refused to obtain counsel and insisted on acting on his own behalf throughout the protracted negotiations. The attorney never met or directly communicated in any way with the husband during the entire course of the negotiations. After several months, the wife advised the attorney that the parties had reached agreement and presented the attorney with the terms. The attorney then prepared a proposed agreement that contained all of the agreed-upon terms.

The attorney mailed the proposed agreement to the husband, with a cover letter stating the following: “As you know, I have been retained by your wife to represent her in this matter. I enclose two copies of the separation agreement negotiated by you and your wife. Please read it and, if it meets with your approval, sign both copies before a notary and return them to me. I will then have your wife sign them and furnish you with a fully executed copy.”

Is the attorney subject to discipline?

(A) Yes, because the attorney did not suggest that the husband seek the advice of independent counsel before signing the agreement.

(A) Incorrect. While Model Rule 4.3 allows attorneys contacting unrepresented individuals on behalf of clients to advise the third parties to seek counsel (this is the only permissible legal advice attorneys in this situation may give), it does not require attorneys to do so.

(B) Yes, because the attorney directly communicated with an unrepresented person.

(B) Incorrect. Contact with unrepresented persons on behalf of clients is proper for attorneys so long as they comply with the requirements of Rule 4.3.

(C) No, because the attorney acted only as a scrivener.

(C) Incorrect. Regardless of an attorney’s level of involvement on behalf of his client, the attorney may properly communicate with unrepresented third parties subject to the requirements of Model Rule 4.3.

(D) No, because the attorney’s letter did not imply that the attorney was disinterested.

(D) Correct. Model Rule 4.3 on contact with unrepresented persons requires only that attorneys do not feign disinterest to unrepresented adversaries and correct any known misunderstandings regarding his role in the matter. The attorney here has done so and thus the conduct was proper.

