



COLLEGE OF LAW
Conservation Easements and
Ethics

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Jesse J. Richardson, Jr.

Professor of Law

WVU College of Law

Jesse.Richardson@mail.wvu.edu



Background

- Application of the Model Rules of Professional Conduct to conservation easement situations
- Internal Revenue Code has identified conservation easements as primary areas of abuse



Hypothetical 1

Devious Developer purchases a parcel of agricultural land for development, but the local government denies a rezoning request required for the proposed development. Devious consults with Dewey Cheatum, Esq. about donating a conservation easement on the property. Cheatum also represented Devious with respect to the unsuccessful rezoning. Devious and Cheatum retain an appraiser, Lazy Funtime, to appraise the value of the conservation easement but do not inform her about the denial of rezoning. She fails to uncover the denial and values the easement based on the potential development if rezoned. The attorney says nothing.



Hypothetical 1 Considerations

Rule 1.2(d) of the MRPC provides that “[a] lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but the lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel and assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.” “Fraud” or “fraudulent” denotes conduct that is fraudulent under the substantive or procedural law of the applicable jurisdiction and has a purpose to deceive.”



Hypothetical 1 Considerations

Comment [5] to Rule 1.0 provides that negligent misrepresentation or negligent failure to apprise another of relevant information is neither “fraud” nor “fraudulent.” At the same time, neither reliance nor damages are required for conduct to be fraudulent.

Rule 4.1 also admonishes the attorney to not make any “false statement of material law or fact to a third person” or “fail to disclose a material fact when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6 [Confidentiality of Information].”



Hypothetical 2

Newkid Land Trust embarks on its first easement. However, the landowner has little income and does not trust attorneys. Newkid has been unable to obtain grant funding to pay the attorneys' fees. Newkid calls Carrie Conservation, an experienced conservation easement attorney in the area, and requests a conservation easement form. Conservation provides the form.



Hypothetical 2 Considerations

Rule 5.5(a) prohibits a lawyer from assisting a non-lawyer in the practice of law. Although the definition of “the practice of law” varies from state to state, the preparation of legal documents, such as conservation easements, for another would typically meet the unauthorized practice standards.

Can being too helpful equate to aiding the unlawful practice of law?



Hypothetical 3

Ima Swellguy, Esq. is very active in community affairs. He is concerned about the environment and has donated a conservation easement on his property. He also serves on the Board of Directors of the Rural Views Land Trust. Fran Farmer consults with Swellguy about donating an easement on her property to Rural Views. Should Swellguy represent Farmer?



Hypothetical 4

Wally Wealthy, Esq. owns a country estate in Scenic County, Nirvana. Wally is very active in local environmental groups and wants to maintain the rural character of the area. Delilah Dirtfarmer owns a farm adjacent to Wealthy's estate. Delilah consults with Wally about donating a conservation easement on her property.



Hypothetical 3 and 4 Considerations

Rule 2.1 requires the lawyer to “exercise independent professional judgment and render candid advice.” This duty underlies the conflict of interest rules (for example, Rules 1.7, 1.8, 1.9, 1.18, and 5.4).

Rule 1.7(a)(1) prohibits a lawyer from representing a client where “the representation of one client will be directly adverse to another client.”



Hypothetical 3 and 4 Considerations

Rule 1.7(a)(2) provides that a lawyer may not represent a client if “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.”



Hypothetical 3 and 4 Considerations

Rule 1.7(b) allows exceptions to these prohibitions if the client gives informed consent, the lawyer can provide competent and diligent representation to each client, the representation is lawful and the clients will not be asserting claims against each other in a proceeding. Comment [10] to Rule 1.7 amplifies the obligation: “The lawyer’s own interest should not be permitted to have an adverse effect on the representation of the client.”



Hypothetical 5

Frieda Flatbroke wishes to donate a conservation easement on her farm to the Peaceful Valley Landtrust. In speaking with the land trust's representative, Frieda learns that she will have to pay an attorney to draft the agreement. That fact suddenly makes her less enthusiastic about the donation. When the representative offers to have the land trust pay the fees, Frieda agrees to the donation.



Hypothetical 5

Peaceful Valley contacts Yan Youngster, to whom they have referred a number of cases, who represents Frieda. In the course of negotiations, Peaceful Valley makes it clear that they want no more than one subdivided parcel on the subject property. Frieda is equally adamant that she needs three subdivided parcels, one for each of her children. Peaceful Valley's referrals have been important for Yan's fledgling law practice.



Hypothetical 5 Considerations

Rule 5.4 (c) prohibits a lawyer from permitting “a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer’s professional judgment in rendering such legal services.” Rule 1.8(f) places explicit conditions on an attorney accepting compensation for representing a client from one other than the client.



Hypothetical 5 Considerations

Specifically, the client must give informed consent, the arrangement must not interfere with the independent exercise of the lawyer's professional judgment or the attorney-client relationship, and the confidentiality of information must be protected pursuant to Rule 1.6.

Sometimes informed consent with regard to the payment and identity of the payer will allow the arrangement to move forward. However, if the third-party payment creates a conflict of interest, Rule 1.7 must be complied with.



Hypothetical 6

Earl Environmentalist, Esq. is an avid environmentalist. He supports the local land trust. He believes that conservation easements represent one of the ways to protect critical open space. Poor Farmer consults with Earl about possibly donating a conservation easement to the local land trust. Her goals are to avoid estate taxes and ensure that the land remains in the family as a working farm.



Hypothetical 6 Considerations

A lawyer's "obligation zealously to protect and pursue a client's legitimate interests, within the bounds of the law, while maintaining a professional, courteous and civil attitude toward all persons involved in the legal system" form one of the basic principles underlying the Model Rules. This principle is embodied in Rule 1.3's requirement that a lawyer act with reasonable diligence and promptness in representing a client. However, a lawyer is not bound to press for every advantage possible on behalf of his client. For example, the scope of the representation may allow the lawyer to use professional discretion in determining particular means.



Hypothetical 6 Considerations

This ethical obligation requires, in the judgment of this author, that an attorney explore all alternatives available to achieve the client's goals and share the alternatives, and the ramifications of each, with the client. Full disclosure forms the linchpin of zealous representation.

Rule 2.1 provides, in part, that “a lawyer may refer not only to the law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation.”



Hypothetical 7

Fran Forester donated a conservation easement on her property in 2020, agreeing to certain forest management practices. Lana Lawyer, Esq. represented her in that transaction. Now Fran comes to Lana with a draft carbon lease received from a carbon company. She wants to enter into a lease to supplement her income. Lana realizes that the lease requires many of the same practices required by the conservation easement.



Hypothetical 7 Considerations

- 4 parcels/6 acres total/\$9,000 value
- Former black coal camp in West Virginia
- 25 heirs- all known, locations known, most in-state
- Family tree
- Great-great-grandparents- deaths in 1904, 1923



Conclusions

- Full disclosure
- Informed consent
- Engagement letters

