

辯論賽題：律師倫理規範

阿巴米國(Albamia)是個聯邦國家，每一州都有各自的法律，也分別舉行律師資格考試。向阿巴米國華頓州(Warton)註冊成立的三元電子公司是一個製造電子零件的廠商，業務遍及各州及海外。三元電子設有法務處，由于大威擔任處長。于大威與公司簽訂有僱傭契約乙份，其內容如附件一。于大威在進入三元電子 15 年以前，就通過了華頓州的律師考試，取得華頓州的律師資格，也加入了華頓州的律師公會。該公會訂有律師倫理規範，對全體會員都有拘束力，其內容如附件二。于大威在公司的職級是資深副總經理，向總經理報告。法務處除了處長以外，一共有 3 名法務經理及 2 名秘書。

三元電子在與華頓州相鄰的開曼州(Kaymen)，有一家叫作凱橡工業有限公司的供應商。凱橡工業有一次提供原料給三元電子的時候，用了不同的配方，導致三元電子的產品被經銷商大批退貨，三元電子的損失約 8 億元。

爲了向凱橡工業求償，于大威研究了相關的法律及事實，認爲三元電子的勝算很高，而且開曼州的法律及律師倫理規範都沒有禁止非律師或公司律師爲公司擔任民事訴訟的代理人，於是決定以外州個案律師(*counsel pro hac vice*)的身分，代理三元電子在開曼州的法院對凱橡工業起訴，請求賠償 8 億元的損失。開曼州法院允許了于大威以此身分出庭。由於證據不足，開曼州的初審法院雖然判決三元電子勝訴，但賠償金額只有 1 億元。三元電子的總經理在得知判決結果後很失望，決定上訴，要求于大威另聘開曼州的律師來代理上訴案。

于大威爲了選擇律師，特別到開曼州與幾位開曼州的律師面談，最後的選擇是二位律師之一：他的大學同學林必華律師、以及另一位資深的開曼州律師魏必翔。在與林必華面談的時候，同學敘舊閒談，于大威聊到他的兒子正申請進入開曼州的名校林閣中學就讀。林必華表示他是林閣中學校友，最近才剛捐了一筆錢給林閣中學改建校舍，和學校的校長有點私交，因此答應推薦于大威的兒子入學，于大威表示感謝。

三元電子的財務狀況並不好，沒有辦法支付很高的律師費。魏必翔的收費方式是按時計酬，預估本案上訴的律師費大約要 200 萬元，但應按實際花費的時間支付其報酬。林必華表示他的收費比較有彈性。爲了提供林必華足夠的激勵，于大威告訴林必華，雙方可以約定除了委任當時先給付 3 萬元外，未來三元電子成功求償所取得金額的 25%，也作爲林必華的後酬。林必華查過開曼律師公會的倫理規範，確定沒有禁止律師對民事案件收後酬後，便簽約同意進行。林必華在簽約後第二天以電子郵件提出訴訟的策略建議，文末順便向于大威賀喜，因爲林閣中學校長通知林必華說于大威的兒子已順利取得該中學的入學許可了。于大威回到公司後把面談的結果及簽訂的合約內容及律師收費原則向總經理提出書面報告並將合約作爲報告附件，但總經理沒有細看契約內容就請秘書把報告存檔備查。

由於爭執的金額很大，雙方在上訴中唇槍舌劍，互不相讓。凱橡工業的代理人主張新配方是三元電子的陳志明協理要求凱橡工業使用的，但是來作證的陳志明堅決否認。爲了調查事實真相，上訴法院要求凱橡工業提供原料供應當月份所使用的全部配方資料。凱橡工業認爲配方是機密，因此法官要求實際參與訴訟的林必華和于大威簽署切結書，同意不將任何訴訟中得知的配方資料揭露給任何人，包括三元電子在內。林必華和于大威都簽了切結書。

經過了 3 年的審理後，開曼州上訴法院撤銷初審判決，判決凱橡工業必須賠償三元電子 4 億元，且不得再上訴。林必華律師在三元電子收到 4 億元賠償款後，立刻向三元電子要求後酬 1 億元。三元電子的董事會聞訊後感到訝異，不願意支付這筆後酬，於是要法務處的另一位法務經理研究三元電子是否有拒絕支付後酬的正當理由。三元電子同時以于大威沒經過公司的同意便在開

曼州法院作為公司代理人出庭、將案件委託給同學、和林必華約定鉅額後酬等事由，要求于大威離職。于大威雖心有不甘，還是勉強同意。三元電子為了法律事務的延續性考量，在于大威離職自行開業後，還是繼續委託于大威處理一些未結的案件。

于大威在上訴審開庭的時候，用筆記本記下了凱橡工業提出的配方，但是他特別在筆記本上註明「機密，請勿流傳」。于大威離職的時候，認為筆記本是案卷資料，把筆記本留在辦公室沒有帶走，事後筆記本被不知情的研發人員拿到研發部參考。3 個月之後，三元電子突然被檢察官部門以竊取營業秘密為理由進行搜索，並且在研發部門查獲與凱橡工業相同的配方。三元電子總經理至今才明白于大威沒有向公司報告他簽的保密切結書，還把筆記本存放在公司。三元電子決定拒付當時還沒有支付給于大威的 2 萬元律師費，並要求于大威把所有為三元電子辦理案件的卷宗交給三元電子的新律師。于大威拒絕，表示除非三元電子結清律師費，否則不會交出卷宗。

三元電子因而以聲請人身分，向華頓州的律師公會檢舉相對人于大威違反律師倫理規範，由華頓州律師公會的倫理風紀委員會審理。

附件一

EMPLOYMENT AGREEMENT

AGREEMENT dated the 2nd day of February, 2003, between San Yuan Electronics, Inc., a Warton corporation, with an office at 23F, 201 Technology Road, Tourson City, Warton, Albama (the "Company"), and David Yu, residing at 21 Loreal Boulevard, Creekland, Albama (the "Employee").

WITNESSETH:

WHEREAS, the Company desires to employ the Employee and the Employee is willing to accept such employment, all on the terms hereinafter set forth;

NOW, THEREFORE, the parties agree as follows:

1. **Employment.** The Company hereby employs the Employee as its Senior Vice President and General Counsel on the terms hereinafter set forth for a period of 5 years from the date of this Agreement, and the Employee hereby accepts such employment.
2. **Duties.** The Employee will render services in such executive, supervisory and general administrative capacities as the Board of Directors of the Company shall from time to time determine. Without limiting the foregoing, the Employee will manage the Company's legal and compliance matters, including coordination with the Company's outside legal counsel. The Employee undertakes to comply with all applicable laws, regulations and rules in the performance of his duties hereunder.
3. **Exclusivity.** The Employee will devote all of his working time to performing his duties under this Agreement, and during his employment with the Company the Employee will not (i) act for his own account in any manner which is competitive with any of the business of the Company or which would interfere with the performance of his duties under this Agreement, or (ii) serve as an officer, director or employee of or advisor to any other business entity, or (iii) invest or have any financial interest, direct or indirect, in any business competitive with any of the business of the Company, provided, however, that notwithstanding the foregoing, the Employee may own up to 1% of the outstanding equity securities of any company engaged in any such competitive business whose shares are listed on a national securities exchange or regularly quoted in an over-the-counter market by one or more members of a national or an affiliated securities association. The Employee will be deemed to have an indirect financial interest in any business in which any of the following has any financial interest: The Employee's spouse; any lineal descendant or ancestor of the Employee; any brother or sister of the Employee; and any child (but not grandchild) of any such brother or sister.
4. **Compensation.**
 - 4.1 *Salary.* During the first three years of his employment, the Company will pay the Employee a salary at the rate of \$6,000,000 per year in equal, weekly installments. Thereafter the Company will review the Employee's salary at least annually, but, in any event, although the Company may increase, decrease or not change the Employee's salary, his salary will not at any time be less than \$4,500,000 per year payable in equal, weekly installments. The Employee will not be entitled to overtime or other additional compensation as a result of services performed during evenings, weekends, holidays or at other times.

4.2 *Deductions.* The Company will deduct and withhold from any compensation payable to the Employee under this Agreement such amounts as the Company is required to deduct and withhold by law. The Company may also deduct and withhold from any such compensation, to the extent permitted by law, such amounts as the Employee may owe to the Company.

5. **Expenses.**

5.1 The Company will reimburse the Employee for all proper, normal and reasonable expenses incurred by the Employee in performing his obligations under this Agreement upon the Employee's furnishing the Company with satisfactory evidence of such expenditures. The Employee will not incur any unusual or major expenditures without the Company's prior written approval. Without limiting the foregoing, the Employee will not, without the Company's prior written approval, incur any travel expenses (including the cost of transportation, meals and lodging) in excess of \$100,000 in the aggregate for any one trip.

5.2 The Company will also furnish the Employee, at its expense, with a Toyota car__ or comparable automobile to enable the Employee to perform his duties under this Agreement. The Company will pay all costs of insuring, maintaining, repairing and operating the automobile. The Employee will furnish the Company with appropriate evidence of such costs.

6. **Benefits.**

6.1 The Company will provide the Employee, at the Company's expense, with medical, hospital and disability insurance which is not less favorable than that which it provides to any other employee of the Company.

6.2 The Employee will be entitled to 20 days vacation during each calendar year (January 1 to December 31) in addition to any holidays which the Company observes. Vacation time must be used during each calendar year; if it is not used, it will be forfeited. No payment will be made for unused vacation time.

6.3 The Employee's salary and other rights and benefits under this Agreement will not be suspended or terminated because the Employee is absent from work due to illness, accident or other disability; but the Company may deduct from the Employee's salary under Section 4.1 any payment received by the Employee under any disability insurance which the Company provides the Employee pursuant to Section 6.1. The provisions of this Section 6.3 will not limit or affect the rights of the Company under Section 7.

7. **Results Of The Employee's Services.**

7.1 The Company will be entitled to and will own all the results and proceeds of the Employee's services under this Agreement, including, without limitation, all rights throughout the world to any copyright, patent, trademark or other right and to all ideas, inventions, products, programs, procedures, formats and other materials of any kind created or developed or worked on by the Employee during her employment by the Company; the same shall be the sole and exclusive property of the Company; and the Employee will not have any right, title or interest of any nature or kind therein. Without limiting the foregoing, it will be presumed that any copyright, patent, trademark or other right and any idea, invention, product, program, procedure, format or material created, developed or worked on by the Employee at any time during the term of her employment will be a result or proceed of the Employee's services under this Agreement. The Employee will take such action and execute such documents as the Company may request to warrant and confirm the Company's title to and ownership of all such results and proceeds and to transfer and assign to the Company any rights

which the Employee may have therein.

7.2 The Company will also own, and promptly on receipt thereof the Employee will pay to the Company, any monies and other proceeds to which the Employee is entitled on account of rights pertaining to any of the Company's products which the Employee acquired before the date of this Agreement.

8. **Negative Covenants.**

8.1 The Employee will not, during or after the term of this Agreement, disclose to any third person or use or take any personal advantage of any confidential information or any trade secret of any kind or nature obtained by him during the term hereof.

8.2 To the full extent permitted by law, the Employee will not for a period of two years following the termination of his employment with the Company:

- (i) attempt to cause any person, firm or corporation which is a customer of or has a contractual relationship with the Company at the time of the termination of his employment to terminate such relationship with the Company, and this provision shall apply regardless of whether such customer has a valid contractual arrangement with the Company;
- (ii) attempt to cause any employee of the Company to leave such employment;
- (iii) engage any person who was an employee of the Company at the time of the termination of his employment or cause such person otherwise to become associated with the Employee or with any other person, corporation, partnership or other entity with which the Employee may thereafter become associated;
- (iv) engage in any activity or perform any services competitive with any business conducted by the Company at the time of such termination.

9. **Governing Law; Remedies**

9.1 This Agreement has been executed in the State of Warton and shall be governed by and construed in all respects in accordance with the law of the State of Warton.

9.2 Except as otherwise expressly provided in this Agreement, any dispute or claim arising under or with respect to this Agreement will be resolved by arbitration in Warton, in accordance with the Rules for the Resolution of Employment Disputes of the Warton Arbitration Association before a panel of three (3) arbitrators, one appointed by the Employee, one appointed by the Company, and the third appointed by said Association. The decision or award of a majority of the arbitrators shall be final and binding upon the parties. Any arbitral award may be entered as a judgment or order in any court of competent jurisdiction.

9.3 A court of competent jurisdiction, if it determines any provision of this Agreement to be unreasonable in scope, time or geography, is hereby authorized by the Employee and the Company to enforce the same in such narrower scope, shorter time or lesser geography as such court determines to be reasonable and proper under all the circumstances.

10. **Severability Of Provisions.** If any provision of this Agreement or the application of any such provision to any person or circumstance is held invalid, the remainder of this Agreement, and the application of such provision other than to the extent it is held invalid, will not be invalidated or affected thereby.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement as of the day and year first above written.

[--Company--]
By: _____
Name:
Title:

[Employee]

附件二

倫理規範

- 第一條 本規範依華頓州律師法第三十條規定訂定之。
- 第二條 律師執行職務，應遵守法律、本規範及律師公會章程。
- 第三條 律師應重視職務之自由與獨立。
- 第四條 律師應精研法令，充實法律專業知識，吸收新知，提昇法律服務品質。
- 第五條 律師應體認律師職務為公共職務，於執行職務時，應兼顧當事人合法權益及公共利益。
- 第六條 律師不應拘泥於訴訟勝敗而忽略真實之發現。
- 第七條 律師不得以誇大不實之宣傳、支付介紹人報酬、聘雇業務人員或其他不正當之方法招攬業務。
- 第八條 律師得於法庭外向證人詢問其所知之事實，但該詢問以就必要事實之說明或為辯護有必要者為限，不得誘導證人為不實之陳述。
- 第九條 受僱於企業之律師，不得以律師身分為該企業之訴訟代理人。
- 第十條 律師應依據法令及正當程序，盡力維護當事人之合法權益，對於受任事件之處理，不得無故延宕，並應及時告知事件進行之重要情事。
- 第十一條 律師對於受任事件，應將法律意見坦誠告知委任人，不得故意曲解法令或為欺罔之告知，致誤導委任人為不正確之期待或判斷。
- 第十二條 律師就受任事件，不得擔保有利之結果。
- 第十三條 律師於執行職務時，如發現和解息訟符合當事人之利益及法律正義時，宜協力促成之。
- 第十四條 律師不得受任下列事件，但第三款及第四款之事件經原委任人同意者，不在此限：
 一、依信賴關係或法律顧問關係而常年接受諮詢，與該諮詢事件有關者為對造之事件。
 二、與受任之事件利害相反之事件。
 三、以現在受任事件之委任人為對造之其他事件。
 四、由現在受任事件之對造所委任之其他事件。
 五、本人或同事務所之律師曾任公務員、依法令從事公務之人員或仲裁人而職務上所處理之事件。但原已受任之事件不在此限。
 六、律師之財產、業務或個人利益可能影響專業判斷之事件。
 七、委任人有數人，而其間利害關係相衝突之事件。
- 第十五條 律師應對於委任人明示其酬金及計算方法。
 律師不得就案件之裁判結果約定後酬。
- 第十六條 律師不得就其經辦案件之標的獲取金錢利益，亦不得就尚未終結之訴訟案件直接或間接受讓系爭標的物。
- 第十七條 律師就同一受任事件，不得再接受相對人之委任，同一事件進行中雖與原委任人終止委任，亦不得接受相對人之委任。但同時或先後受雙方當事人之書面委任而從事仲裁、斡旋或調解者，不在此限。
- 第十八條 律師就受任事件維護當事人之合法權益時不得故為詆毀、中傷或其他有損相對人之不當行為。
- 第十九條 律師就受任事件於未獲委任人之授權或同意前，不得無故逕與相對人洽議，亦不得收受相對人之報酬或餽贈。
- 第二十條 律師知悉相對人已委任律師者，不應未經對方律師之同意而直接與相對人聯繫。
- 第二十一條 律師間應彼此尊重，顧及同業之正當利益，對於同業之詢問應予答覆或告以不能答覆之理由。
- 第二十二條 律師不應詆毀、中傷其他律師，亦不得教唆或放任當事人為之。

- 第二十三條 律師知悉其他律師有違反本規範之具體事證，除負有保密義務者外，宜報告該律師所屬之律師公會。
- 第二十四條 律師不得以不正當之方法妨礙其他律師受任事件，或使委任人終止對其他律師之委任。
- 第二十五條 律師基於自己之原因對於同業進行民事或刑事訴訟程序之前，應先通知律師公會。前項程序，若為民事爭議或刑事告訴乃論事件，應先經所屬律師公會試行調解。
- 第二十六條 律師相互間因受任事件所生之爭議，應向所屬律師公會請求調處。
- 第二十七條 受僱於法律事務所之律師離職時，不應促使該事務所之當事人轉委任自己為受任人。另行受僱於其他法律事務所者，亦同。
- 第二十八條 律師違反本規範，由所屬律師公會之倫理風紀委員會依其公平正當之程序規則進行審議，並按左列方法處置之：
- 一、勸告。
 - 二、警告。
 - 三、情節重大者，送請相關機關處理。
- 第二十九條 本規範經華頓州律師公會會員代表大會通過後施行。修正時，亦同。

爭點表

1. 于大威作為三元電子的資深副總經理，又和公司簽訂僱傭契約，對他的華頓州律師身分及行為的規範有影響嗎？有沒有角色衝突的問題？
2. 于大威作為華頓州的律師，可不可以在開曼州代理三元電子出庭訴訟？律師在外州作民事訴訟代理人，應該遵守律師倫理規範嗎？哪一州的律師倫理規範？三元電子的主張有理由嗎？
3. 于大威捨魏必翔而選擇林必華，有沒有違反律師倫理規範或對公司的忠實義務？于大威與林必華就民事訴訟結果約定後酬，有沒有違反律師倫理規範？後酬的約定會影響律師職務的執行嗎？三元電子的主張有理由嗎？
4. 于大威簽署保密切結書的行為是否有不當之處？後來對機密資料的處理方式有無不當之處？三元電子會不會有因此違法而必須負責的可能性？如果有，于大威是否違反了律師倫理？
5. 案件的卷宗屬於誰？當事人還是律師？律師可以因為當事人未付律師費而拒絕交還卷宗嗎？如果可以，律師倫理上有什麼限制？應該有限制嗎？

辯題疑義 Q&A

請注意，出題單位只會澄清事實描述不清楚的部份，不會去補充、解釋、引申或推論相關事實。如果事實中沒有提到董事會曾經作了某決議，就表示沒有這種決議。

問： 題目第一段第四行稱「于大威與公司簽訂有僱傭契約乙份」一語，其中有關「僱傭契約」一詞，是否明確定性該契約為僱傭契約，而不得為雙方當事人爭執？還是雙方當事人仍可就附件一之契約內容另外定性為其他性質之契約(例如委任契約)？

答： 事實已明確描述，請自行判斷。

問： 題目第二段第三行以下，三元電子公司是否已經由董事會決議同意展開對凱橡工業求償八億元之法律動作？或是只是于大威個人認定受損八億後自行展開之法律動作？

答： 事實已明確描述，請自行判斷。

問： 題目第二段第五行所稱「開曼州的法律及律師倫理規範都沒有禁止非律師或公司律師為公司擔任民事訴訟的代理人」，是否即代表在該州係「允許」公司律師擔任公司民事訴訟的代理人？還是只是說明沒有相關之規定？

答： 事實已明確描述，請自行判斷。

問： 題目第二段第六行所稱「決定以外州律師的身分，代理三元電子在開曼州的法院對凱橡工業起訴」及題目第六段第五行「于大威沒經過公司的同意便在開曼州法院作為公司代理人起訴」綜合以觀，是否即代表于大威事實上確實未在起訴之前讓公司知道其欲代理公司起訴？是否即代表公司董事會並未在其起訴前同意其代理起訴？

答： 事實已明確描述，請自行判斷。

問： 承上述，于大威在起訴後判決前是否有讓三元電子公司知道代理起訴之事實？該公司董事會是否在起訴後判決前有作成決議同意于大威繼續代理進行訴訟？

答： 事實已明確描述，請自行判斷。

問： 承上述，三元電子公司到底是在何時知道于大威代理三元電子起訴？

答： 事實已明確描述，請自行判斷。

問： 題目第二段第八行「開曼州法院允許了于大威以此身份出庭」一事實，是否代表依開曼州律師規範或其他相關規定明白允許外州律師在本州法院進行訴訟？還是並無特別規定？

答： 依開曼州的法律，法院可以作此裁定。

問： 題目第七段第八行「三元電子辦理案件的卷宗」此一事實中，三元電子要求于大威返還之卷宗是否全部都是離職自行開業後三元電子委託于大威的案件？還是包括于大威擔任公

司副總經理時處理之案件卷宗？

答：離職自行開業後的案件卷宗。

問：題目第七段第九行「三元電子結清律師費」中所稱之二萬元律師費，是否指于大威離職後三元電子委託案件時約定的律師費？或是包括于大威為三元電子在開曼州第一審出任外州律師之律師費？

答：離職後三元電子委託案件時約定的律師費。

問：開曼州律師倫理及其他相關規範中，有無明文允許于大威之一切行為的規定？例如：其是否允許于大威將案件委託給同學、和林必華約定鉅額後酬、未報告簽署保密切結書、存放筆記本於公司或拒絕交付卷宗？

答：事實已明確描述，請自行判斷。

問：題目附件一之契約中第 2 點，依其契約文字，于大威每次處理法務事件之前是否仍須經董事會指示？還是于大威可以不須經董事會指示即處理法律事務？

答：事實已明確描述，請自行判斷。

問：關於魏必翔律師按時計酬的收費原則為何？(理由：因題目雖言「預估本案上訴的律師費大約 200 萬元」，但又強調「應按實際花費的時間支付其報酬」，所以我們欲知讓該收費方式，以評估與林必華律師約定後酬之收費方式其中之差距。)

答：收費的方式是按實際花費的時間收費。200 萬元是魏律師估計可能花費的時間後預估的金額。