

PACE UNIVERSITY SCHOOL OF LAW

PROFESSIONAL RESPONSIBILITY
PROFESSOR HUMBACH
FINAL EXAMINATION

December 18, 2012
TIME LIMIT: 4 HOURS

IN TAKING THIS EXAMINATION, YOU ARE REQUIRED TO COMPLY WITH THE SCHOOL OF LAW RULES AND PROCEDURES FOR FINAL EXAMINATIONS. YOU ARE REMINDED TO PLACE YOUR EXAMINATION NUMBER ON EACH EXAMINATION BOOK AND SIGN OUT WITH THE PROCTOR, SUBMITTING TO HIM OR HER YOUR EXAMINATION BOOK(S) AND THE QUESTIONS AT THE CONCLUSION OF THE EXAMINATION.

DO NOT UNDER ANY CIRCUMSTANCES REVEAL YOUR IDENTITY ON YOUR EXAMINATION PAPERS OTHER THAN BY YOUR EXAMINATION NUMBER. ACTIONS BY A STUDENT TO DEFEAT THE ANONYMITY POLICY IS A MATTER OF ACADEMIC DISHONESTY.

GENERAL INSTRUCTIONS:

This examination consists of multiple-choice questions to be answered on the Scantron.

- Write your examination number on the “name” line. *Write it NOW.*
- Mark "A" in the “Test Form” box on the right side of the answer sheet. *Mark it NOW.*
- Also, write your examination number in the boxes where it says "I.D. Number" on the right side. Use **only** the first 4 columns and *do not skip columns*. Then carefully mark your exam number in the vertically striped area below. You should mark only one number in each of the first four columns. *This is part of the test.*

Answer each question selecting the *best* answer. Mark your choice on the answer sheet with the special pencil provided. *Select only one answer per question.* **If you change an answer, be sure to fully erase your original answer** or the question may be marked *wrong*. You may lose points if you do not mark **darkly** enough or if you write at the top, sides, etc. of the answer sheet.

When you complete the examination, turn in the answer sheet together with this question booklet.

Model Rules: Assume that the applicable ethical rules are the Model Rules of Professional Conduct as currently promulgated by the American Bar Association. The word “proper” means permitted by the Model Rules or applicable law.

LIMITED PERMITTED MATERIAL: The **only** material you may bring into the examination is your copy of your assigned *Standards, Rules and Statutes* book (Dzienkowski, or Gillers & Simon), **provided it is not marked except as allowed below.**

Allowable markings: Your copy of the *Standards, Rules and Statutes* book may be highlighted, underlined, tabbed and annotated with **brief** notations, but **“no paragraphs,”** no bits of outlines and no sentences or sentence fragments exceeding a few words or so on the margins, backs, etc. of the printed material. *All materials brought into the examination will, in fairness to all, be subject to inspection, and students who are deemed to have violated this rule will have the material in question taken away, and they will be unable to refer to it during the examination.* A determination by me that you have exceeded the letter or spirit of this “limited marking” rule will be final, so *if in doubt, tear it out.*

1. Calypso Corporation is a high-end electronics importer. Dissatisfied consumers bring actions against Calypso several times a year. Edward Estoril, a civil litigation lawyer, represents Calypso in these actions. Yesterday, Calypso's president asked Edward to defend his college-age daughter, charged with DWI. Edward politely tried to say "no" but the president (who happens to select the company's lawyers) insisted. Edward has absolutely no experience in DWI cases or, indeed, in any kind of criminal defense work. Under the Model Rules:

- a. It would be ethically improper for Edward to take on this representation.
- b. Edward would be ethically permitted to take on this representation only if he associates with another lawyer who is experienced in the relevant area of law.
- c. It is ethically permissible for Edward to take on this representation as long as he can, with reasonable preparation, get himself ready to handle the matter.
- d. Edward is ethically permitted to take on this representation because, as an attorney admitted to practice, Edward is ethically considered competent to handle legal problems of every kind.

2. Assume in the preceding question that Edward was persuaded to accept the DWI case. In his initial interview with his new client:

- a. It would probably be improper for Edward to ask her how many drinks she had before driving because her response might tie his hands in presenting the best possible defense.

b. If Edward does not try to find out how many drinks she had before driving, he might well be violating the ethical duty of competent representation.

c. Since Edward's job is to represent his client and her interests, not to judge her, it is essentially irrelevant to Edward how many drinks she had before driving.

d. If the company president wants to know how many drinks his daughter had consumed, then Edward has a duty to get him the information because he is paying the fee.

3. Allen's client, Sara, is accused of arson for setting fire to a waste bin in her school restroom. Sara confidentially tells Allen that she started the fire in order to get two classmates in trouble because she "hates" them. Unfortunately, there's no evidence (other than Sara's word) that the other two girls were in the restroom. However, cigarette butts were found discarded in the waste bin, and they would have been theoretically capable of causing the fire. Most would consider it ethically *proper* for Allen:

- a. To introduce testimony that the butts were found in the waste bin.
- b. To introduce testimony that the butts were found in the waste bin and to argue that they were capable of causing the fire.
- c. Both of the above.
- d. None of the above.

4. Suppose in the preceding case, another student is called to the stand to testify that he smelled smoke outside the restroom and reported the fire. In response to a question by the prosecutor, the student testified that no one entered or left the restroom while he was in the area. Allen knows from his client that this statement is false, but he's not sure whether the witness is lying or merely mistaken. Allen must take reasonable remedial measures if:

- a. Allen is the one who originally called the student to the stand.
- b. The prosecutor is the one who originally called the student to the stand.
- c. Both of the above.
- d. None of the above.

5. The ABA's Model Rules of Professional Conduct:

- a. Are legally binding because they were issued by the ABA.
- b. Include "comments" that are supposed to have binding status just like the rules do.
- c. Have been adapted and used as the basis for professional ethics codes that are legally binding on lawyer in most states.
- d. Are primarily seen as only aspirational guidelines for the profession.

6. In a certain Midwestern state, it was found that court-appointed lawyers representing children in civil matters are often not competent

to do the job. The state's legislature enacted a statute requiring lawyers to complete at least 12 hours of CLE in the relevant law before being eligible for such appointments. A challenge to the validity of this statute is likely to be:

- a. Successful, because there are many ways to become competent in a legal specialty without taking CLE courses.
- b. Unsuccessful, because state legislatures have the power to make virtually any laws that serve the public interest.
- c. Successful, because the legislature is encroaching on the inherent power of the judiciary.
- d. Unsuccessful, unless the state constitution has an explicit provision that prevents the legislature from setting requirements for the profession.

7. Spencer and Ron practice law in the same firm. Recently, Spencer learned that Ron had obtained a postponement of a hearing by telling the judge that the witness was "unavailable." Spencer knew that this wasn't true and that Ron's real reason for the postponement was so he could take a planned ski trip to Aspen. Spencer is concerned that, if he reports the violation, he might also be subject to discipline because of Ron's lie to the judge. Spencer's concern would be well-founded if:

- a. Spencer is a partner in the firm and he didn't make reasonable efforts to make sure that the firm had measures in effect to give reasonable assurance that misconduct like Ron's would not occur.

- b. Spencer and Ron are on the same level in the firm and, knowing of Ron's false statement, Spencer has taken an action that ratified Ron's unethical conduct.
- c. Spencer is Ron's boss and he's been passively relying on Ron's sense of professional integrity and honor to prevent contraventions of the ethical rules.
- d. All of the above.
- e. None of the above. Each lawyer is *personally* responsible for his or her own ethical behavior.

8. Arlene Osterman has been assigned by her firm to represent Don Porter, who's accused of robbing and brutally beating an elderly man outside his apartment. In confidential discussions with Arlene, Porter seems almost proud of his crime and Arlene finds him repulsive. Arlene sees several valid arguments for releasing Porter pending trial on a fairly low bail (which is all Porter could afford). However, she doesn't like the guy and, honestly, she doesn't want to see him out on the street. Porter makes clear, however, that he wants out.

- a. As Porter's lawyer, Arlene has discretion to not argue for low bail if she finds it personally repugnant to do so.
- b. Arlene is subject to discipline if she does not use reasonable diligence to get Porter released at low bail.
- c. Because this is a criminal defense matter, Arlene has essentially complete freedom to decide how to handle the case.

- d. Because release on bail is not an "objective" of representation but a "means," the final choice of whether to seek release on bail is up to Arlene, as the lawyer.

9. Preparing for a personal-injury trial, Wilber Renton became very concerned that the jury might not believe some of his key witnesses. Unexpectedly, he got a call from Ray Jacobs, the lawyer for the defendant. Jacobs said that the insurance company was willing to settle for \$180,000. Wilber realized this was only a few thousand less than his client's privately stated "rock-bottom minimum" of \$185,000. Fearing the offer would go away if he waited (and needing the contingent fee), Wilber said: "We accept!" Assume that, one week before, Wilber had told Jacobs that he had his client's okay to settle on whatever terms he deemed appropriate. The settlement is binding on Wilber's client:

- a. Because the Model Rules say that decisions to settle are generally up to the lawyer.
- b. Because Wilber had apparent authority based on his statement the week before.
- c. As long as Wilber made a reasonable professional judgment, based on his professional expertise, that the settlement was in his client's best interest.
- d. None of the above. Under the usual rules of agency, the settlement should not be binding on the client because Wilber lacked authority to settle for less than \$185,000.

10. In the preceding question, Wilber may be:

- a. Liable to his client for damages if a court decides that the settlement is binding on his client.

- b. Liable to the defendant for damages if a court decides that the settlement is *not* binding on his client.
- c. Both of the above.
- d. None of the above. Under the Model Rules, Wilber would be protected from civil liability as long as he used his best professional judgment.

11. Robert Warner represents a small metal finishing shop that generates small amounts of TCP, a hazardous substance. The shop owner tells Robert that his employees have illegally disposed of the TCP by taking it home and throwing it their ordinary household trash. Lately, though, the owner has begun to worry how much trouble he might be in if this practice is ever discovered by the authorities. He has asked Robert the penalties for improper disposal of TCP.

- a. Robert may properly explain the penalties and other consequences of getting caught.
- b. Robert may properly explain the penalties and suggest steps the client might take to reduce the risk that violations will be detected.
- c. Both of the above.
- d. Robert should advise the client to desist from legal violations and, if the client refuses, Robert must withdraw from representation and report the past violations to the authorities.

12. Dennis Marlin represents Pete Akins, a warehouse worker who's buying a small condo. When Dennis met Akins at his law office just before the closing, Akins said he'd just been laid off from work and he didn't know where he'd find another job. At the closing itself, the representative of the mortgage lender casually asked Akins, "How's the job going down at the warehouse?" Akins replied "fine," which Dennis knew was a lie. Dennis also knew there's now a good chance that Akins will default on the mortgage loan, causing the bank a substantial financial loss.

- a. The lawyer's duty of confidentiality has an exception under which Dennis is *permitted* but not required to disclose that his client has made a fraudulent statement.
- b. The lawyer's duty of confidentiality has an exception under which Dennis is *required* to disclose that his client has made a fraudulent statement.
- c. The lawyer's duty of truthfulness to others would require Dennis to speak up, despite confidentiality, and disclose that his client has made a fraudulent statement.
- d. Both b. and c. above.

13. Suppose in the preceding question that Dennis has a great professional reluctance to disclose confidential client information. As an alternative to doing so, he may properly:

- a. Withdraw from representation without notice or explanation.
- b. Withdraw from representation and thereby terminate his duty to keep the client information confidential.

c. Withdraw from representation but he must give notice of withdrawal to the bank if withdrawal alone would not suffice to avoid assisting Akins in fraudulent conduct.

d. Continue to represent Akins without disclosing anything as long as he carefully avoids saying or doing anything that tends to re-confirm his client's false statement.

14. Lawyers are free to choose whether to represent a particular client and the Model Rules:

a. Discourage lawyers from representing persons or causes where doing so would bring discredit to the legal profession.

b. Deem representation to constitute an implicit endorsement of the client's views or activities.

c. Both of the above.

d. Allow a lawyer to withdraw from representation if the client insists on an action that the lawyer finds repugnant.

15. Susan Dobbs was appointed to act as appellate counsel for Taney, who had been convicted of violating the federal anti-hacking statute. Taney's alleged crime consisted of violating the "terms of service" of a video posting site on the Internet. When Susan reviewed the record, she found 8 valid bases for appeal. She decided, however, that the most promising approach was to argue that the statute doesn't cover mere violations of "terms of service" (which nobody ever reads anyway). She focused her brief and oral argument on that argument.

a. Susan has probably violated her duty to take all practicable legal and ethical measures there were available to vindicate her client's interests.

b. As a disciplinary matter, Susan has probably *not* violated her duty of diligence to Taney merely because she did not urge all valid bases for appeal.

c. By choosing to pass over a number of valid bases for appeal, Susan almost certainly deprived Taney of effective assistance of counsel.

d. If Susan disregarded Taney's specific instruction to argue other valid bases for appeal, Taney would thereby have been denied his constitutional right to counsel.

16. When a person convicted of a crime at trial asserts a claim of "ineffective assistance of counsel," the relief being sought is ordinarily:

a. Money damages for malpractice.

b. Reversal of the conviction.

c. Professional discipline of the lawyer in question.

d. Disqualification of the lawyer in question.

17. In determining whether a criminal accused has received effective assistance of counsel, which does the Supreme Court consider more important?

a. The client's interest in having a legally trained person to speak for him and put his own freely chosen viewpoints and positions into the language of the law.

- b. The client's interest in achieving a legal outcome that best serves the client's interests.
- c. The client's interest in dignity and autonomy, so that every criminal accused, irrespective of wealth or means, can have a lawyer who will do his bidding (within the bounds of the law).
- d. The client's interest in having the highest levels of professionalism and high-quality legal service maintained throughout the criminal justice process.

18. In the course of a private consultation, Randy Caine told his lawyer, Gil Folsom, that he'd heard that Dan Garth's home repair business was the subject of a secret investigation by the state's attorney's office—a fact that related to the representation of Caine. Garth is another of Folsom's clients, and Folsom provides general representation for all aspects of Garth's business. Folsom has an ethical duty to:

- a. Keep what Caine told him confidential, and he has no duty or right to relay this information to Garth.
- b. Report this information to Garth, and Folsom therefore has no duty to Caine to keep this information confidential.
- c. Both of the above are true statements.
- d. Folsom may be in a box and ethically required to withdraw from the representation of at least one of these two clients.

19. Suppose in the preceding question, the state's attorney now wants to subpoena Folsom (in an unrelated case) to testify that Caine knew

about the investigation of Garth's business. Caine has no objection to his giving the testimony, but Garth does.

- a. Folsom probably cannot be required to give the testimony that the state's attorney wants because of his ethical duty of confidentiality.
- b. Folsom probably cannot be required to give the testimony that the state's attorney if Garth asserts the attorney-client privilege.
- c. Both of the above.
- d. None of the above. No reason appears here why Folsom cannot be required to give the testimony that the state's attorney wants.

20. Matrimonial lawyer Ray Rella had his client's husband discretely followed by an investigator. The client was shocked to find out what her husband had been up to with one of her best friends. "The next time I see that little hussy," she exclaimed, "I'm going to slap her face!" Rella believed her and, though he did not expect any substantial injury, he tried to persuade her to change her mind—unsuccessfully. Under the Model Rules:

- a. Rella would be *permitted* to reveal his client's stated intention to commit a crime.
- b. Rella would be *obligated* to reveal his client's stated intention to commit a crime.
- c. Both of the above.
- d. None of the above.

21. Willie Cove was at the county jail visiting his client, Elgar “Snitch” Bogan. After they’d finished talking about Snitch’s case, they spent a few minutes exchanging gossip about some of the low-lives that the two of them knew in common. At one point, Snitch asked Willie with a chuckle: “Are you really helping Kevin Slick on that robbery rap? You know, his alibi’s totally bogus!” Snitch added some confirming details. Willie is ethically prohibited from voluntarily revealing this short discussion about Kevin Slick:

- a. Under his duty of confidentiality to Kevin.
- b. Under his duty of confidentiality to Snitch.
- c. Under the attorney-client privilege.
- d. All of the above.
- e. None of the above.

22. The short discussion that Willie and Snitch had about Kevin Slick in the preceding question:

- a. Is subject to the attorney-client privilege because it contains information relating to Willie’s representation of Kevin.
- b. Is subject to the attorney-client privilege simply because it was a communication between a lawyer and client.
- c. Could not be subject to the ethical duty of confidentiality because the discussion was not between Willie and Kevin, the client to whom the information pertained.

d. Could be subject to the ethical duty of confidentiality that Willie owes Kevin even though Kevin had no idea that the discussion took place.

23. While Willie and Snitch were talking about how to proceed with Snitch’s defense, Snitch asked Willie to go to his apartment and retrieve some used airline boarding passes that he thought could help support an alibi. Willie went to the apartment and, while there, he stumbled onto a small plastic baggie of jewelry. Willie recognized some of the items in the baggie as fitting the newspaper description of items stolen in a burglary the week before. Willie is sure they’re the same. As Snitch’s attorney:

- a. Willie should take possession of the jewelry and put it in a safe deposit box for safekeeping until it can be returned to its rightful owners without implicating his client in a crime.
- b. Willie could properly leave the jewelry where he found it and that would probably be the safest course for Willie.
- c. Willie could take the jewelry to the police and not be required to reveal where he got it because that information is a direct product of a privileged attorney-client communication.
- d. Willie could probably be required to disclose the whereabouts of the jewelry because his client did not instruct him to look for it in the apartment.

24. Suppose in the preceding question Willie takes possession of the jewelry and delivers it to the police saying he is “not at liberty to say how or where he got it.” Because Willie has many clients who are criminal defendants, the mere fact that he had the jewelry in his possession was not particularly incriminating as to any one of them

- a. Willie's knowledge of where he found the jewelry would not be covered by the attorney-client privilege.
- b. Willie could be legally compelled to disclose where he found the jewelry because he has moved it from that location.
- c. Both of the above.
- d. Willie could not be compelled to disclose where he found the jewelry because he learned about its whereabouts as a direct product of a privileged attorney-client communication.

25. Parker Haddock represents a small pharmaceutical factory that manufactures prescription products under contract for big drug companies. Last March, his client asked if it would be all right to get rid of old "batch records" that are over five years old. Parker gave the okay. Last week, the prosecutor subpoenaed some of the records that were already disposed of. Under the Model Rules:

- a. Parker is subject to discipline because a lawyer may never advise a client to destroy anything that might later be subpoenaed as evidence
- b. Parker is subject to discipline if he advised his client to dispose of evidence in contravention of law.
- c. Both of the above.
- d. Parker need not be concerned about possible discipline as long as the records in question had not actually been subpoenaed at the time when he gave the okay to dispose of them.

26. Ervin Cleffs received a call from his contact at client Cowell Clinics. Cowell was concerned that some of the doctors in its employ are illegally over-prescribing certain pain medications. Fearing legal repercussions, Cowell asks Ervin to do an internal investigation. Ervin realizes that the investigation won't be successful unless he has free and open discussions with the doctors in question. Under the Model Rules, Ervin should make sure the doctors understand:

- a. That, as lawyer for Cowell Clinics, Ervin would normally be considered to represent the employee doctors as well.
- b. That anything the doctors say to Ervin in confidence is subject to the attorney-client privilege and, therefore, Ervin would not be allowed to disclose it without the doctor's permission.
- c. The identity of Ervin's client.
- d. All of the above.

27. In the preceding question, one of the doctors, Dr. Green, privately admits to Ervin that he's "maybe gone little overboard" in prescribing pain medications. But, he says, he was only trying to provide good service to the clinic's patients so they'd continue to return. Cowell is later indicted for drug law violations. The prosecutor offers the company a plea bargain in exchange for "cooperation," *i.e.*, full disclosure of all information it has concerning possible illegal conduct by its employees. Cowell asks Ervin for the notes of his conversations with Dr. Green:

- a. Ervin must refuse the request, as the notes are covered by the attorney-client privilege.

- b. The notes could not be covered by the attorney-client privilege unless Dr. Green was in Cowell's "control group."
- c. Ervin could be held liable to Dr. Green for turning over the notes because, as a Cowell employee, the doctor would also have been Ervin's client.
- d. Ervin could be held liable to Dr. Green for turning over the notes if, in introducing himself to the doctor, he told Dr. Green that he was representing the doctor too (even if, in point of fact, he was not).

28. In the *UpJohn* case, the Supreme Court:

- a. Confined the attorney-client privilege in the corporate context to communications between the corporation's lawyers and members of the control group in order cut down on the wall of secrecy that was impeding investigations of criminal activity.
- b. Did not essentially change the scope of the attorney-client privilege in the corporate context.
- c. Expanded the attorney-client privilege in the corporate context, thereby eliminating most concerns that employees might legitimately have about free and open discussions with their corporation's lawyers.
- d. Expanded the attorney-client privilege in the corporate context, but probably did little to allay legitimate concerns that employees should have about free and open discussions with their corporation's lawyers.

29. Jeffries is acting as Warner's attorney in the sale of a house. The buyer's lawyer is making demands that Jeffries thinks are unreasonable, and he advised Warner to wait before signing the contract. This morning, Warner ran into the buyer at a coffee shop. The two of them agreed that both really wanted the deal very much and that the problem was "the lawyers" who were "getting in the way." Warner asks Jeffries to talk to the buyer directly.

- a. Jeffries should advise Warner to tell the buyer to call Jeffries (if he wants to), but Jeffries is not ethically permitted to initiate the contact.
- b. Even if the buyer calls Jeffries on his own initiative, Jeffries is not ethically permitted to talk with the buyer directly about the deal unless his lawyer consents.
- c. The conversations between Warner and the buyer are already improper, and Jeffries must take care that his client does not tell him anything that was said.
- d. The conversations between Warner and the buyer are not in themselves improper, but Jeffries may take no role in any future conversations they may have (*e.g.*, advising Warner with respect to them).

30. Gerald Ross represents Martha Astor. She's suing the Sapin Cleaning Co. whose driver backed into her in a supermarket parking lot. Out of a clear blue, Sapin's driver called Gerald and said he had some relevant information that the company's lawyer was withholding.

- a. Gerald may properly talk to the driver and accept the information provided it all is oral and none of it is in writing.

- b. Gerald may properly talk to the driver and accept the information even if some of it is in writing, as long as the papers in question are not the property of Sapin.
- c. If the driver has not retained a lawyer of his own, Gerald is free to talk to him since the employer's lawyer is not normally also the lawyer for the employee.
- d. Gerald should not be communicating directly with the driver about the litigation unless Sapin's lawyer consents.

31. Tanner is suspected of having secret offshore bank accounts, but the prosecutor is having trouble proving it. Ken Peyton, one of Tanner's business associates, is also threatened with indictment. The prosecutor persuades Peyton to speak to Tanner about his offshore accounts and get him to talk about how he avoids detection. Peyton is specifically told to be sure that Tanner's lawyer is not present, and he's rigged up with a device to record the conversation surreptitiously. Peyton's recording gives the government valuable evidence against Tanner.

- a. The prosecutor has probably not violated the no-contact rule because the use of informants is considered a legitimate investigative technique.
- b. The prosecutor has probably not violated the no-contact rule because he has not talked to Tanner directly.
- c. Both of the above.
- d. The prosecutor has probably not violated the no-contact rule because, under the McDade Amendment, the rule does not apply to prosecutors.

- e. All of the above.

32. Jack Runyon was plaintiffs' lawyer in a class action against Royce Consumer Products Co. One day Runyon got an email sent by Royce's lawyer. Runyon could see from the very first line that the email was not intended for him but for Royce's CEO. As soon as Runyon realized that the email was not meant for him, he should have:

- a. Promptly notified the Royce's lawyer that he received the email.
- b. Quickly read through the email and then notified Royce's lawyer.
- c. Kept silent and not volunteered anything, but he must be perfectly truthful if ever asked about the email.
- d. Treated any possible attorney-client privilege as waived because, under circumstances such as these, most courts would say that it automatically has been

33. If Runyon in the preceding question failed to deal with the misdirected email properly:

- a. He is subject to discipline.
- b. He may find himself disqualified from acting in the case.
- c. Both of the above.
- d. He would be liable to pay civil damages to Royce pursuant to the Model Rules.
- e. All of the above.

34. Representing the seller of a small catering business, Sandra George heard her client tell the buyer that they'd never had any serious complaints from customers. Sandra knew, however, that two years before there'd been a claim of food poisoning (which she'd barely managed to get taken care of quietly). She tried, without success, to get her client to correct the false statement.

- a. Sandra herself has no further ethical responsibilities with respect to the statement since she did not make it.
- b. Sandra could be considered to be "assisting" the client in fraudulent conduct if she goes ahead and continues to represent her client in the sale.
- c. Sandra would not be considered to be "assisting" her client in fraudulent conduct unless she advised the client to make the false statement in the first place
- d. If Sandra did not advise the client to make the false statement and did everything she could to get the client to correct it, there is no logical way she could be considered to be "assisting" the client in fraudulent conduct.

35. Suppose in the preceding question that Sandra's client, the seller, was contractually required to provide the buyer with a certificate concerning past complaints from customers. At the closing, Sandra delivered a certificate, signed by her client and stating that there had been no serious complaints in the last 5 years, despite the claim from two years previously. If the buyer sustains substantial economic loss as a result of relying on the false certificate, then:

- a. Sandra would be civilly liable to the buyer under the ethical rule that prohibits a lawyer from assisting a client in committing fraud.
- b. Sandra would be civilly liable to the buyer because she has violated Model Rule 4.1 by handing over the certificate and thereby making the material misrepresentation that it contains.
- c. Both of the above.
- d. Sandra has committed ethical violations but, in the view of at least some courts, she nonetheless should not be held civilly liable for the client's false statement under facts like these.

36. While negotiating a dispute over possession of a painting, Durban warned the opposing attorney that his client had "better settle this thing pretty fast" or it could become "more than a civil matter," because his client "might prefer charges at the DA's office." Durban's statement is:

- a. Out of bounds, since the Model Rules expressly prohibit a lawyer from using threats of criminal prosecution to obtain an advantage in civil matter.
- b. A false statement of fact if Durban's client had never actually given any indication that he was thinking of preferring charges.
- c. Both of the above.
- d. Not per se impermissible under the Model Rules.

37. In negotiating the sale of a bakery on behalf of a client, Greg Collier wrote a letter to the buyer's lawyer stating that the dough machine had been replaced last year. Greg knew this was totally false.

The buyer relied on this statement but, after the sale was completed, discovered it was false and has included Greg as a defendant in a damage action for misrepresentations.

- a. In states that have moved away from the traditional rule of privity, Greg could probably get the complaint dismissed as to him because the buyer was not Greg's client.
- b. In most states, Greg could probably get the complaint dismissed as to him because his statement was made to a lawyer and adversary, and lawyers have no right to rely on assertions of fact by their adversaries.
- c. Greg's false statement may be actionable, at least in some states, if the buyer's reliance was reasonably foreseeable or Greg invited the buyer to rely.
- d. Lawyers have a duty of honesty and they have traditionally been held liable for misrepresentation when others incur economic losses by relying on the material false statements that they make.

38. If a lawyer assisting a client in transactional negotiations stands by silently and lets her client make material misrepresentations, the reason some say that the lawyer should *not* be liable to others who rely on the misrepresentations is that:

- a. The doctrine of transactional immunity means that lawyers are not subject to liability for statements they make while representing clients in transactions.
- b. Logically, a lawyer cannot be liable for client misrepresentations unless the lawyer actually "assists" in uttering the representations themselves.

- c. Lawyers never owe duties to the clients of other lawyers, at least none that they can put ahead of their own clients' interests.
- d. The potential for such liability would unduly distract the lawyer from the undivided loyalty that the lawyer owes to her own client.

Facts for Marvin Whetstone questions. Marvin Whetstone has a client being sued by a man who was injured while trespassing across the client's property on a speeding motorcycle. Marvin concludes that a jury would probably hold his client liable if it heard all the relevant evidence. He thinks, however, that certain evidentiary rules (having to do with post-accident safety repairs) can be used to keep out damaging evidence and increase his client's chance of victory.

39. A strategy of trying to prevent the jury from hearing damaging but relevant evidence would generally be considered:

- a. Ethically improper. Marvin should not invoke the rules of evidence in ways that are calculated to make the jury to reach a verdict that is contrary to the actual facts of the case.
- b. Ethically proper. Marvin may properly object to inadmissible evidence even if his purpose is to prevent the jury from learning facts that would count against his client.
- c. Ethically improper. As an officer of the court, Marvin should not obstruct the presentation of any evidence that tends to reveal the truth of the matter.

d. None of the above. A conscientious lawyer should object to *all* inadmissible evidence, even if the evidence would be favorable to his client.

40. During the trial, Marvin Whetstone hears a witness make a statement that Marvin positively knows to be false. Although Marvin thinks the witness believes the statement is true, he is expected to take reasonable remedial measures if:

- a. The statement was made by his client or by a witness that Marvin has called to testify.
- b. The statement was made by a witness called by his adversary while the witness is responding to a question that the adversary asked.
- c. Both of the above.
- d. None of the above.

41. Suppose that during the trial Marvin Whetstone hears his client respond falsely to one of his own questions during direct examination.

- a. Before taking other remedial measures, he should first try to get his client to retract or correct the false statement.
- b. If Marvin cannot get his client to retract or correct the false statement, he may disclose falsehood, but only if doing so would not reveal information protected by the rule of confidentiality.
- c. He would be ethically required to withdraw from the case if he could not persuade his client to retract or correct the false statement and confidentiality prevents him from revealing it.

d. All of the above.

42. Public defender Wanda Rivlin represents Floyd Trublood, who's accused of robbing a deli. According to the deli's surveillance video, the robbery occurred at 6:45 pm. Although Floyd has confidentially admitted the robbery to Rivlin, he tells her he has some friends who can truthfully testify that Floyd was with them watching a movie until 7:10 p.m. on the date in question. Rivlin concludes that the electronic date stamp on the deli's video must be erroneous and asks your advice as to whether she should present the alibi evidence. You should advise her presenting the alibi would:

- a. Be a clear ethical violation because she knows that Floyd is guilty of robbing the deli.
- b. Be ethically proper, at least in the view of some ethical authorities.
- c. Violate the rule that prohibits lawyers from presenting perjured testimony.
- d. Be ethically improper if Rivlin even *suspects* that Floyd's friends made the alibi up.

43. Police found cocaine under the back seat of a car that Clarisse Hobbs was riding in. She's charged with possession. It's stipulated that Clarisse met the driver, Dave, at a party and that he was driving her home. The prosecutor apparently hopes to persuade the jury that Clarisse's presence in the car creates an inference that she was in possession of the drugs located there. Clarisse has confidentially told her lawyer that she'd bought the cocaine so that she and Dave could "party" with it at her place. Dave has skipped bail and disappeared. Clarisse's lawyer, Wanda Rivlin, can properly argue that:

- a. The prosecutor's inference that Clarisse had possession is false and Clarisse had no connection with the drugs other than the happenstance of being in the same car with them.
- b. There's no proof that Clarisse had any connection with the drugs other than the happenstance of being in the same car with them.
- c. In her professional opinion, based on an evaluation of the prosecutor's evidence, Clarisse did not even know that the drugs were in the car.
- d. Rivlin can properly argue any of the above.

44. In deciding whether to prosecute Clarisse based on the available evidence, the prosecutor may properly pursue the charge only if:

- a. He does not know that he lacks probable cause
- b. He's sure that he has enough evidence to get a conviction
- c. He's persuaded that Clarisse has actually committed the crime charged.
- d. All of the above.

45. Bill Osborne has a new client in a domestic violence case. He feels that his client may be forgetting or repressing some legally important details. He would like to ask her certain questions about possible facts that she has not mentioned but which, if proved, could help her win.

- a. Osborne's ethical duty to thoroughly prepare his case requires him to probe his client concerning facts that the client

may not realize are legally relevant, and doing this should not be considered "coaching."

- b. The line between proper witness preparation and coaching is clear, and Osborne should steer clear of that line.
- c. Osborne may properly tell his client what she should and should not say on the witness stand—just not how to say it.
- d. Any supposed factual details that a witness does not remember on her own should not be urged at trial because of the high risk that they amount to nothing more than planted memories.

46. In our adversary system:

- a. Getting at truth—an accurate reconstruction of the relevant past events—is the highest value to be served, and all other values and goals take a lower priority.
- b. Truth is important but the interest in determining truth must frequently yield to other policy concerns that are pursued even at the expense of truth.
- c. Each lawyer, as an officer of the court, has an overriding duty to justice, and lawyers may not let client interests take precedence over truth.
- d. Lawyers are expected to fight hard for their client's causes, but they must disclose evidence and witnesses that may be unfavorable to their own client's interest.

47. Nestor represents a restaurant that is being sued by a patron for discrimination. The suit is based on the conduct of a waiter who, the

plaintiff alleges, provided deliberately poor service. The waiter denies doing anything wrong, and Nestor has interviewed several witnesses suggested by the restaurant owner. Nestor would prefer if these witnesses did not talk to the plaintiff's lawyer until he's had a chance to properly prepare them for depositions. Under the Model Rules, Nestor is permitted to request which of the following persons to refrain from discussing the case with the lawyer for other side?

- a. Bill Fraley, a regular patron of the restaurant who very much enjoys dining there.
- b. Angela Dix, a first-time patron of the restaurant who had never eaten there previously.
- c. Angus McCord, one of the waiter's colleagues who also works for the restaurant.
- d. All of the above.

48. Gabe Cantor is counsel for a non-party witness at a trial. One of the issues in the case is whether, on a certain day, the witness could have been at home at 3:30 and at Polk School at 3:40. The two are about a 20-minute walk apart but the distance can be covered by car in a couple of minutes. The witness (who's not a licensed driver) was asked, "Did you drive from your home to Polk School between 3:30 and 3:40?" The truth is that she did. Which of the following answers would be perjury?

- a. "I don't even have a driver's license"
- b. "I prefer to walk to school."
- c. "No."
- d. All of the above.

49. During direct examination of one of the other side's witnesses at trial, Fred Lattimore heard the witness make a statement that was very favorable to Fred's client but which Fred knows to be totally false:

- a. Fred must take reasonable remedial measures even if he only suspects that the false statement constituted perjury or other fraudulent or criminal conduct.
- b. Fred must take reasonable remedial measures because an outright false statement is always perjury.
- c. Fred must promptly withdraw from the case if confidentiality prevents him from taking reasonable remedial measures.
- d. Fred is not ethically required to do take remedial measures in this situation unless he knows that the witness knew the statement was false.

50. Suppose that during the same trial Fred Lattimore hears his own client respond falsely to one of Fred's questions during direct examination. If Fred decides that he's ethically required to disclose his client's false statement, he should:

- a. Request a private conference with the judge but try, if possible, to avoid disclosing the false statement to the other side (unless the judge insists).
- b. Send an anonymous letter to the judge in order to avoid being accused of violating the rule that requires confidentiality.
- c. Make the disclosure to the judge in the presence of the lawyer for the adversary.

- d. Any of the above would be a permissible option.

51. The Supreme Court has held that an evasive answer to a question is not necessarily perjury. Does this mean that a lawyer may counsel a client on how to avoid giving damaging testimony by preparing the client to testify in non-perjurious but evasive ways?

- a. Definitely yes. A lawyer may use any means permitted by law to protect his client's interests, and evasive answers are not flatly prohibited by law.
- b. Definitely no. Telling a client not to "volunteer" the truth constitutes coaching, which is itself ethically improper.
- c. Maybe, but a lawyer has ethical duties to avoid deceit and dishonesty, and helping a client to give misleading testimony would get the lawyer on very dangerous ground.
- d. No, because a lawyer's duty of candor basically means that a lawyer may never hinder revelation of the whole truth.

52. In a personal injury traffic accident case, a witness for the plaintiff testified that the defendant changed lanes without signaling. The defense lawyer's investigator discovered that, some years before, the witness had received a suspended sentence for passing a bad check. Now, however, she's a devoted mom of three, has a good job as a bank teller and is a respected member of the community. The defense lawyer would like to use the conviction to discredit her testimony, if possible.

- a. The defense could not ethically use the conviction to impeach the witness if doing so would jeopardize her job and standing in the community.

- b. The defense could not ethically use the conviction to impeach the witness if the client has confidentially admitted changing lanes without signaling

- c. As an officer of the court, the lawyer's foremost duty is to justice, and it would be improper for him to impeach the witness unless the benefit to his client would clearly outweigh the detriment to the witness.

- d. None of the above.

53. Hare's Pharmacy was robbed by a man wearing a blue t-shirt with a "Yankees" team logo on it. Vesey was charged in the robbery after a blue "Yankees" t-shirt was later found in his apartment. Vesey admits owning the shirt, but a local laundry owner told police that Vesey had the t-shirt in for washing at the time the robbery occurred. Although the prosecutor believes laundry owner's statement, she wants to support her case by presenting evidence at trial that Vesey owned the blue shirt.

- a. The prosecutor has no obligation to make the defense aware of the laundry owner's statement to the police as long as she has only second-hand knowledge of it.
- b. It would generally be considered proper (even though somewhat misleading) for the prosecutor to show that Vesey owned the blue shirt found in his apartment in order to create an inference that he was the robber.
- c. Both of the above.
- d. None of the above.

54. Suppose in the preceding question that the prosecutor presents evidence at trial that Vesey owned a blue t-shirt with a "Yankees" team

logo. Meanwhile, Vesey's lawyer has learned (through Vesey) that the laundry owner can testify truthfully that Vesey had a blue t-shirt with a "Yankees" team logo in for washing at the time of the robbery. If Vesey has also told his lawyer that he owned two identical blue "Yankees" t-shirts, most would probably say:

- a. It would still generally be considered proper (even though somewhat misleading) for Vesey's lawyer to present the laundry owner's testimony in order to refute the prosecutor's inference that Vesey was the robber.
- b. Vesey's lawyer could not properly present the laundry owner's testimony in order to refute the prosecutor's inference that Vesey was the robber.
- c. Vesey's lawyer should inform the prosecutor that Vesey actually owned two identical blue shirts.
- d. None of the above.

55. Arrowsmith represents a defendant insured by Nevermore Insurance Co. The insured has been sued for several million dollars following a construction accident. Arrowsmith correctly surmises that the plaintiffs are very pressed for funds and cannot afford to wait very long for payment. By making repeated motions to adjourn depositions, constantly coming back and asking for more information, always "needing" more time to respond to plaintiff's requests and routinely getting adjournments of hearings, conferences and discovery proceedings, Arrowsmith can probably squeeze the plaintiff into accepting a very low settlement and protect the insurance company from having to pay a large judgment.

- a. Arrowsmith would be subject to discipline if he employs such tactics for the sole purpose of frustrating the plaintiff's cause.
- b. Arrowsmith must do everything reasonable to expedite the case even if an expeditious resolution is not in his client's interest.
- c. Strategic delay is an accepted litigation technique, and Arrowsmith would be remiss not to employ it whenever advantageous for his client.
- d. Because Arrowsmith's client is potentially liable for millions, it would practically be malpractice for Arrowsmith not try to slow the case down.

56. The Chandler Law Firm has long represented Granger Corporation on a variety of corporate and tax matters. In the recent past Chandler has also done occasional work for a small supplier of parts. The supplier has gotten into a dispute with Granger over an order of corner brackets and has asked a litigation partner in Chandler to file an action so it can "get Granger's attention on this."

- a. It would be improper for Chandler to represent the supplier in its suit against Granger.
- b. Chandler may represent the supplier in its suit against Granger only if there is no substantial relationship between the bracket matter and legal work that Chandler does for Granger.
- c. Chandler may represent the supplier in its suit against Granger as long as the two matters are handled by different lawyers in the firm.

- d. Chandler may represent the supplier in its suit against Granger as long as the two matters are handled by different lawyers and adequate screening is promptly put into place.

57. Delia Dirce represents Ferdinand Flamboise in the latter's real estate development activities. Recently Flamboise proposed letting Dirce have an equity participation in a land flip deal. The terms would be the same as those offered to the other investors. There is a good chance of major profit, and Dirce very much wants to invest in this deal.

- a. Dirce can properly become an investor in the Flamboise deal, but only if Flamboise has somebody else representing him in this particular transaction.
- b. Dirce can properly become an investor in the Flamboise deal, but only if Flamboise gives written informed consent, the terms are fair to him and certain other conditions are met.
- c. Dirce can properly become an investor in the Flamboise deal, but only if there are also other investors receiving similar terms, they all give written informed consent, and certain other conditions are met.
- d. It would be improper under any circumstances for Dirce to get involved in a business deal with her own client.

58. While Dirce was working on one of Flamboise's deals last year, her client encountered sudden cash flow problems due to an unexpected fire. Dirce lent Flamboise \$100,000 for several weeks on terms comparable to those available at a bank. Would Dirce be subject to discipline for making this loan?

- a. Yes, because it is never proper for lawyers to provide financial assistance to their own clients.
- b. Yes, because it is improper for lawyers to get involved in business transactions with their own clients.
- c. Both of the above.
- d. Not necessarily, as long as Dirce advised Flamboise in writing to seek the advice of an independent lawyer for the loan, she gave him a reasonable chance to do so, and the loan transaction met certain other conditions.

59. Three years ago, Roger Burnside represented a small motor scooter dealership in a dispute over its franchise agreement. Recently, Burnside has been approached by a man who wants to sue the dealership for injuries due to a defective repair that was done in the dealership's shop. Burnside can take the defective repair case despite the dealership's objection:

- a. If Burnside still represents the dealership, provided that the repair claim does not involve confidential information that Burnside might have obtained in the franchise dispute.
- b. If Burnside no longer represents the dealership, provided that the repair claim is not substantially related to the franchise dispute.
- c. If Burnside still represents the dealership, provided that the repair claim is not substantially related to the franchise dispute.
- d. All of the above.

60. In the preceding question suppose that Roger Burnside became a partner in the firm of Edwin & Massie after representing the dealership in the franchise case. Instead of approaching Burnside, the plaintiff who wants to sue the dealership on the repair claim approached another partner in the firm, Tom Massie. In considering whether or not the repair claim is substantially related to the franchise dispute, the primary factor would be:

- a. Whether Burnside could be properly and adequately screened in his new firm.
- b. Whether *in fact* Burnside was properly and adequately screened in his new firm.
- c. Whether, in representing the dealership in the franchise dispute, Burnside might have acquired confidential client information that might be used to the dealership's disadvantage in the repair case.
- d. All of the above.

61. Arthur Mas represents a client in a complex commercial transaction. Pursuant to the parties' agreement, Mas has received a substantial sum of money on his client's behalf. The agreement requires him to hold the money for a time period equal to the time required for bank checks to clear. In dealing with this money, Arthur would be subject to discipline:

- a. If he deposits the money to his own personal bank account and does not keep a careful record of how much in the account belongs to the client.

- b. If he deposits the money to his own personal bank account even if he *does* keep a careful record of how much of the account belongs to the client.
- c. If he engages in commingling of any kind even if no client money is lost.
- d. All of the above.