

## PACE UNIVERSITY SCHOOL OF LAW

PROFESSIONAL RESPONSIBILITY  
PROFESSOR HUMBACH  
FINAL EXAMINATION

December 18, 2015  
TIME LIMIT: 3 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 60 multiple-choice questions to be answered on the Scantron.

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

Answer each multiple-choice question selecting the *best* answer. Mark your choice on the Scantron 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 answers 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. “Ethical” means according to the Model Rules.

**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 While researching a conflicts-of-interest question for a colleague, Beth Farnsworth found several ethics opinions of the American Bar Association that were very much on point. Such opinions:

- a. Are the official records of decision in disbarment proceedings carried out by the American Bar Association.
- b. Would be legally binding on the courts in later professional ethics cases.
- c. Are essentially little more than the views of a committee of a private organization and, as such, tend to be taken with a grain of salt.
- d. Are generally regarded as important persuasive authority on ethics questions, though they are not legally binding as such.

2 A client has accused Farnsworth's colleague of causing a substantial financial loss by bungling a settlement negotiation. Among other things, the colleague allegedly failed to promptly communicate a settlement offer to the client, depriving him of a chance to accept the offer before it was withdrawn. The primary purpose of discipline for such conduct would ordinarily be:

- a. To protect the public and the integrity of the legal system.
- b. To obtain restitution for the client of money lost due to the lawyer's mistake.

- c. To assess damages for malpractice if it occurred.
- d. To punish the colleague for violating the Model Rules.

3 The state legislature is concerned about the many evictions of unrepresented tenants. It is considering a new law under which "tenant defenders" would be licensed to represent low-income tenants in landlord-tenant proceedings. To obtain a license as a tenant defender, an applicant would need to complete a six-month course and pass a test on landlord-tenant law. The tenant defenders' work would include giving low-income tenants advice about their rights under the law and arguing for them in local courts.

- a. The legislature has a general power over licensing the various professions, so there could be no serious doubt that this proposed law would be valid.
- b. There is a real possibility that the proposed law would be held invalid as an invasion of the inherent power of the courts to regulate the practice of law.
- c. As long as the proposed law does not authorize tenant defenders to be full-fledged lawyers, it could not be considered to invade the courts' inherent powers.
- d. Only the courts have the power to adopt rules affecting the legal profession and practice of law.

4 As a lawyer, Milbank is committed to vigorously pursuing her clients' lawful objectives. Which of the following would be

*not* be considered a “lawful” objective that Milbank could properly pursue?

- a. The client has made a binding contract that he regrets and he wants Milbank to find a way for him to avoid being liable to pay damages for non-performance.
- b. The client has caused serious injury by committing assault and battery during a bar fight and he wants Milbank to help him avoid paying damages, if possible.
- c. The client confidentially admits molesting a child but he wants Milbank to use cross-examination, objections to evidence and other such techniques to prevent a guilty verdict and imprisonment.
- d. All of the above could be considered objectives that Milbank could properly pursue.
- e. None of the above could be considered lawful client objectives.

5 Jed Grimley, a criminal defense lawyer, usually “just knows” or strongly suspects that his clients are guilty as charged. However, he never asks them if they did it because he doesn’t want to take a chance of “tying his own hands” with respect to what he can later say and do in court. Grimley’s practice of never asking his clients if they did it:

- a. Is specifically endorsed by the Model Rules.
- b. Is expressly forbidden by the Model Rules.

c. Appears to violate the Model Rules requirement of competence and also to violate the spirit of the rule on candor to the tribunal.

d. Is basically Grimley’s choice to make and his choice would have no obvious ethical implications one way or the other.

6 Late one Monday night, after watching the game on TV, Stanley Oakmont started to review a draft construction contract that had come in by email earlier in the day. Very tired and a little woozy, Oakmont didn’t notice that the other lawyer had left out a common “security” clause that was potentially important to Oakmont’s client. The parties signed the contract without the clause and later, when the other party defaulted, Oakmont’s client lost over \$100,000 that would have been protected if the clause had been present. An error like this:

- a. Means that Oakmont is likely to face disciplinary proceedings and sanctions.
- b. Means Oakmont may be liable for malpractice, but he is not likely to face disciplinary proceedings.
- c. Creates a fairly strong presumption that Oakmont is unfit for the practice of law and he would probably be dealt with accordingly.
- d. Is one that the Model Rules would require the other lawyer call to Oakmont’s attention once he realized that Oakmont had not noticed the omission.

7 Sara Talbot represents Daniel Fogg, the defendant in a breach of copyright case. During a pre-trial conference (and under great pressure from the judge), Talbot agreed to a settlement that required her client to pay \$50,000 to the plaintiff. Even if Talbot did not have actual authority to settle the case, the settlement should still be binding (on these facts):

- a. Because Talbot, as an attorney, automatically had *implied* authority to settle.
- b. Because Talbot, merely by attending the pre-trial conference, would have had apparent authority to settle.
- c. As long as the judge favored the settlement in the interest of the efficient administration of justice.
- d. None of the above.

8 Renna was being tried for a crime he says he did not commit. He told his lawyer that he wanted to testify on his own behalf. The lawyer feared that Renna would be devastated on cross-examination and advised him not to take the stand. Renna insisted to the very end, but his lawyer refused to call him to testify. Renna did not testify and was convicted.

- a. The lawyer has violated the Model Rules for refusing to abide by Renna's choice to testify.
- b. There is a strong possibility that Renna will be able to recover damages for malpractice from his lawyer.
- c. The decision of whether the client should testify in a criminal case is a tactical one that is left to the lawyer.

d. Renna impermissibly attempted to interfere with his lawyer's independent professional judgment as to how to best present the case.

9 Trent is being prosecuted for drug trafficking. The key evidence was obtained in violation of Trent's constitutional rights. However, Trent's lawyer did not make a motion to suppress within the time prescribed by the local procedural rules. Trent has now retained a new lawyer. She argues that Trent's rights guaranteed by the Constitution could not be waived by his lawyer, and that the court must therefore exclude the evidence obtained in violation of those rights.

- a. The new lawyer is wrong. Constitutional rights protecting the accused can be waived, either by the accused or by his lawyer.
- b. The constitutional rights of an accused can be waived by his lawyer but not by the lawyer's misconduct.
- c. The constitutional rights of an accused can be waived by his lawyer but only if the waiver was freely authorized by the client.
- d. Only the actual rightholder can waive a constitutional right.

10 Frances Potter, an antique dealer, was sued in federal court by a dissatisfied customer. She turned the legal papers over to her attorney, who assured her that he'd take care of everything. Five months later, Potter learned that the attorney had failed to

file an answer and that a default judgment had been entered against her. She's hired a new attorney who filed a motion to set aside the judgment and reopen the case. The court will probably decide that Potter is entitled to have the case reopened:

- a. If The failure to file an answer on time was due to the original attorney's inexcusable neglect.
- b. As long as Potter used reasonable diligence to supervise her original attorney.
- c. If Potter's original attorney lied to her and misled her as to progress of the case.
- d. None of the above. An attorney's inexcusable neglect is not considered an exceptional or extraordinary circumstance that justifies reopening a judgment

11 During the course of representing Kridley in a family law matter, Grover was informed that Kridley had a "secret" child from an affair before he got married. Grover has a duty of confidentiality *not* to disclose this information:

- a. Under the law of agency.
- b. Under the Model Rules.
- c. Both of the above.
- d. Only if the information was communicated to Grover by Kridley and not by somebody else.

- e. All of the above.

12 Wallace has been retained by an insurance company to represent Astor, one of its insureds. Astor signed a retainer agreement that states the scope of representation to be "defense of an action brought by Raye for injuries sustained" in a certain automobile accident. Astor was also injured in the crash, and he tells Wallace that he thinks the accident occurred because his car malfunctioned due to a manufacturing defect. Wallace realizes that Astor may have an action against the carmaker.

- a. Wallace has no duty to tell Astor about the possible action against the carmaker since that is not a matter within the scope of representation.
- b. Wallace risks liability for malpractice if he fails to inform Astor that he may have an action against the carmaker
- c. The Model Rules would not allow Wallace to define the scope of representation so as to exclude the possible action against the carmaker.
- d. To limit the scope of representation, it was enough that Wallace put a clause in the retainer agreement stating the limits on what Wallace was responsible for.

13 Jeff Forrest represents construction contractors. One of his clients is Eisen. Another is Dillock. While negotiating a deal between Eisen and Bigbrick, Forrest happened to learn that Bigbrick was secretly trying to lure away one of Dillock's major customers. Forrest wants to warn Dillock but he's

concerned because the warning would disclose information relevant to the Eisen-Bigbrick deal and might negatively affect the negotiations.

- a. Forrest is clearly obligated to communicate this information to his client, Dillock, and he should do so right away.
- b. There's no problem with disclosing the information to Dillock as long as Forrest did not promise to keep it a secret.
- c. Forrest cannot ethically disclose the information to Dillock without getting informed consent from Eisen.
- d. In this kind of situation, the Model Rules give Forrest discretion to either disclose the information or not, whatever he thinks is best.

14 Dixon works as a public defender. He's been assigned to represent a man he thoroughly detests. He realizes that, for constitutional reasons, the key evidence against the man can be suppressed—leaving the prosecution with no case. Dixon does not want to see his client released because he suspects he will commit more crimes, but the client says he wants out ASAP. Assuming Dixon cannot withdraw, he should:

- a. Use his independent professional judgment and refuse to make a motion to suppress if that's what he decides is best for society.
- b. Take whatever lawful and ethical measures are required to further his client's interests.

c. Balance his responsibility to his client with his responsibility to see that justice is done.

d. Notify his client that he's limiting the scope of his representation to *exclude* constitutional law issues.

15 Owen Grey was representing Nelson who was buying a hardware store for cash plus promissory notes. Shortly before the closing, Grey learned that Nelson had misrepresented his financial position and that he probably won't be able to pay the promissory notes. However, Nelson begs Grey not to tell the seller about his financial problems. Grey concludes that, by continuing to represent Nelson and saying nothing to the seller, he will be helping his client to commit a fraud that would cause serious financial harm to the sellers. It appears likely that:

- a. Grey is required to disclose the material facts of the fraud to the seller under Rule 4.1.
- b. Grey is permitted to disclose the material facts of the fraud to the seller under Rule 1.6
- c. Both of the above.
- d. Grey is required to disclose the material facts of the fraud to the seller under Rule 1.6.
- e. All of the above.

16 Carol Minton has been appointed to handle Todd Wayl's appeal of a conviction for armed robbery. Minton is being paid by the state. During her first consultation with Todd, he gave

her a list of 9 items that he wanted her to cover in the brief. Minton does not plan to cover more than 3 of the items

- a. If Minton refuses to include items that Todd wants covered in the brief, Todd will have a strong basis for an ineffective assistance of counsel claim.
- b. Minton should discuss with Todd the means she proposes to use in the representation, including the topics to be covered in the brief.
- c. The Model Rules say that the lawyer, not the client, has the final say on all decisions that require an attorney's professional expertise.
- d. Because Minton is being paid by the state, her fiduciary agency responsibility is not only to Todd but to the state.

17 Redmond represented a client who was charged with stealing valuable computer chips from his employer, a high tech manufacturer. The client told Redmond that he still had a box containing some of the chips, hidden under his ex-wife's mobile home. Redmond went to check and, sure enough, the box containing the chips was there. Redmond left the chips where he found them.

- a. Redmond's knowledge of the location of the chips is protected by the attorney-client privilege.
- b. Redmond has a duty to inform the authorities or, at least, the owner of the location of the chips.

c. Redmond can be properly compelled by a court to provide testimony revealing the location of the chips.

d. Redmond cannot properly be compelled by a court to testify as to his communication with his client, but he can be compelled to reveal the chip's location after he saw it for himself.

18 Suppose in the preceding question Redmond decided to take the box containing the stolen chips to his office for safekeeping—where he kept them until the trial was over.

- a. As an attorney, he was permitted to take them because the chips are covered by the attorney-client privilege.
- b. He would be subject to discipline and even criminal prosecution.
- c. A court could have properly compelled him to reveal where he found the chips.
- d. Both b. and c. above.

19 Maureen Leff was injured when she slipped and fell in an Urbis Supermarket. Several Urbis employees witnessed the fall. The attorneys for Urbis confidentially interviewed these employees, all low paid floor staff. Now Leff's lawyer wants the attorneys' notes of the interviews in discovery. Under the *Upjohn* rule, the notes should be privileged because the Supreme Court:

- a. Established a new national rule of evidence for the attorney-client privilege that is binding in state and federal courts across the country.
- b. Reaffirmed and endorsed the control-group test as the best compromise between confidentiality and full disclosure of corporation secrets.
- c. Held that attorneys representing a corporation also represent the employees and, therefore, the attorney-client privilege applies to their communications.
- d. Held that some communications between a corporation's attorneys and its lower-level employees may be covered by the attorney-client privilege.

20 Suppose in the preceding question that the employees who were confidentially interviewed objected to disclosure of the contents of the notes. The corporation, Urbis, had no objection to turning over the notes to Leff's lawyer.

- a. The notes should be protected from discovery because the employees (as well as the corporation) are protected by the attorney-client privilege under *Upjohn*.
- b. The notes should probably not be protected from discovery because the attorneys for Urbis probably were not also representing the employees.
- c. The notes should be protected from discovery because forcing disclosure would violate the rule of confidentiality.

- d. The notes should be protected from discovery because Urbis's attorneys were not allowed to talk to the employees unless the employees' own lawyers were present.

21 If the notes in the preceding question were *not* subject to discovery because of the local version of the attorney-client privilege:

- a. Maureen Leff might still have access to the facts reported in them because only communications, not facts, are covered by the attorney privilege.
- b. Maureen Leff may find it difficult to learn the facts reported in the notes because the no-contact rule inhibits interviews with an adversary's employees.
- c. Urbis's lawyers could properly request the employees not to voluntarily disclose information about the case to the plaintiff's lawyers.
- d. All of the above.

22 The Supreme Court said the *Upjohn* rule promotes full and frank discussions and disclosure between a corporation's lawyers and its employees who have relevant information or who need legal advice. This rationale for the rule probably is:

- a. Sound, but Rule 1.6 would usually protect the employees' confidential information from compelled disclosure anyway.

- b. Dubious or, at least, greatly overstated because of the lawyer's duties under Rule 1.13(f) and Rule 4.3.
- c. Sound because the *Upjohn* rule effectively assures that the things employees tell the company lawyer will never be used against the employees.
- d. Unsound primarily because of the no-contact rule.

23 Joseph Horne represents the defendant in a personal injury case. While Horne was waiting for a friend in a local bar, the plaintiff in the case suddenly appeared. She said she “wanted to talk.” Horne asked whether the plaintiff's lawyer knew she was there to see him and she replied: “Oh, I don't think we need *him* here. He'd just get in the way. I want to talk to you *personally*.”

- a. Horne cannot ethically talk to the plaintiff.
- b. Horne can ethically talk to the plaintiff, just not about the case.
- c. Horne can ethically talk to the plaintiff about the case because she's waived her right to insist that her counsel be present.
- d. Horne can ethically talk to the plaintiff about the case because she approached him and not the other way around.

24 In another case where Horne also represents the defendant, Horne is convinced that the plaintiff, Roth, lied during a deposition about the extent of his injuries and incapacitation.

Horne's client says he's heard that Roth plays touch football with his kids, which is inconsistent with Roth's claims that he can “hardly walk” without a cane. Without violating the no-contact rule, Horne can:

- a. Send out an investigator to observe Roth from a distance and report on his physical abilities.
- b. Send out a person from his office (anyone other than himself) to strike up a conversation with Roth and induce him to brag about his touch football activities.
- c. Encourage his client (the defendant in the case) to casually “run into” Roth and strike up a conversation with him about sports, and his touch football activities.
- d. All of the above.

25 Perbalt is the target of a criminal investigation under the direction of a federal prosecutor. When Perbalt found out about the investigation, the first thing he did was hire a lawyer. To obtain evidence against Perbalt, the prosecutor got one of Perbalt's old friends to go talk to him using a false pretext and wearing a secret recording device.

- a. As long as the prosecutor used a third party intermediary, this conduct could not constitute a violation of the no-contact rule.
- b. Even if such conduct amounted to a violation of the no-contact rule, a federal prosecutor would be immune from discipline under the McDade Amendment.

c. Even if such conduct was a violation of the no-contact rule, the Supremacy Clause would prevent a state disciplinary authority from disciplining a federal prosecutor.

d. Courts have generally treated such use of informants by federal prosecutors as a legitimate investigative technique authorized by law.

26 It is generally agreed that the no-contact rule exists to:

a. Help assure ascertainment of truth by preventing lawyers from impeding the availability and full disclosure of all relevant facts and evidence.

b. Protect the quasi-proprietary interest that lawyers are considered to have in their fee-paying clients.

c. Prevent lawyers from overreaching to extract information, concessions and the like while talking directly with adversary clients.

d. All of the above.

27 Rule 4.1 of the Model Rules (“Truthfulness in Statements to Others”):

a. Generally holds lawyers to a higher standard of truth, honesty and candor than does Rule 3.3.

b. Generally requires lawyers to clear up misunderstandings about material facts when the lawyer realizes that another lawyer is under a misconception.

c. Places on lawyers the burden of assuring that others are not misled into misunderstanding material facts of a matter.

d. None of the above.

28 Walsh represents Skipper in the sale of a yacht. Right before the closing, Skipper told Walsh that just that morning he’d started up the engine, to see if everything was okay. It wasn’t. The engine made an ugly sound that it never had made before. Skipper insisted, however, in going ahead with the sale because he “needed the money”—and he thought the problem was probably minor. At the closing, the buyer asked Skipper (before paying): “Is everything still shipshape?” Skipper said: “Yes.” Walsh could probably remain silent about the false statement and finish representing Skipper in the sale:

a. Without becoming liable to the buyer for fraud.

b. Without violating the Model Rules.

c. Both of the above.

d. None of the above.

29 In the preceding question, suppose Walsh had voiced confirmation of Skipper’s false statement and continued representing Skipper in the sale:

a. The rule of privity would, under the more modern cases, probably be applied to protect Walsh from liability for damages to the buyer for fraud.

- b. Walsh probably could not be held liable to the buyer for fraud because, generally, there's no right to rely on statements made by an adversary's lawyer.
- c. Because Skipper's fraud was harmful to another's financial interest, Walsh had a *duty* to correct the false statement under Rule 1.6.
- d. Walsh would appear to be subject to discipline under Rule 1.2(d).

30 During settlement negotiations, Della Higby said that her client (the plaintiff) had spent over \$7000 to repair his car. As Higby knew, however, the client had spent only \$2000. The defendant's lawyer, under the erroneous belief that the repair bill was actually over \$10,000, quickly offered a \$7000 settlement in reliance on Higby's false statement. Plaintiff accepted. After paying the settlement, the defendant learned the truth and has sued Higby for fraud.

- a. There is authority under which Higby could not be held liable for fraud on the ground that a lawyer's statements in litigation are absolutely privileged.
- b. There is authority under which Higby *could* be held liable for fraud on the ground that lawyers must be held to the highest standards of honesty.
- c. Both of the above.

- d. Higby probably could not be held liable to the defendant for fraud because, generally, there's no right to rely on statements made by an adversary's lawyer.

31 Flanders sued Eaton for a personal (bodily) injury. As part of discovery, Eaton required Flanders to undergo a physical exam by Eaton's medical expert. During the exam, Eaton's medical expert found a potentially life-threatening medical condition that Flanders apparently was unaware of. Because the condition might have been caused by the accident, Eaton's lawyer decided to keep its existence a secret. Flanders won a verdict, but it was much smaller than it probably would have been if the jury had known his true medical condition. Eaton's lawyer:

- a. Has violated his duties under Rule 4.1 and 3.3 and may also be liable to Flanders for concealing the serious medical problem.
- b. Is subject to discipline for violating Rule 4.1 and 3.3, but he cannot also be held liable to Flanders plaintiff for concealing the serious medical problem.
- c. Seems to have violated Rule 1.6 by failing to disclose information reasonably necessary to prevent death or substantial bodily harm.
- d. Seems to have acted properly under the Model Rules.

32 When Ben Salton bought Greenacre, he had his lawyer check the zoning. The lawyer sent Salton a report stating that the property could be developed with a 175,000 sq.ft.

commercial structure. When Salton later resold the property to Klepp, he showed the report to Klepp and Klepp bought in reliance on it. However, due to a negligent oversight, Salton's lawyer had made a mistake and the property could not be developed as the report stated. It was actually worth only a small fraction of what Klepp had paid. Klepp sued both Salton and his lawyer for negligent misrepresentation. According to the recent trend of cases:

- a. The lawyer can be held liable to Klepp if it was reasonably foreseeable that someone in Klepp's position would rely on the report.
- b. The lawyer could probably get the case dismissed because of the rule of privity.
- c. There is no basis for Klepp to hold the lawyer liable since the lawyer never intended the report for Klepp, only for Salton.
- d. Klepp could not recover because, following caveat emptor, his own lawyer should have done the zoning research himself.

33 Felicia Morelli represented one of the defendants at trial in a complex case with several parties. Each party had separate counsel. During *direct* examination (by plaintiff's lawyer) of a witness called by the plaintiff, Morelli heard the witness make a material statement that she knew was false. Morelli was delighted because, as it happened, the statement was highly beneficial to her own client. Under the Model Rules:

- a. Because Morelli knew the statement was false, she had a duty to take reasonable remedial measures—if necessary, disclosure to the tribunal.
- b. Morelli would appear *not* to have a duty to take remedial measures unless she knew that the witness made the statement with knowledge of its falsity.
- c. Morelli would have a duty to take reasonable remedial measures if she knew or had good reason to suspect that the witness made the statement with knowledge of its falsity.
- d. Because of Morelli's duties of confidentiality and loyalty to her client, she is not permitted to discredit or object to testimony that is beneficial to her client.

34 During the trial in the preceding question, Morelli called a witness who testified that he'd never talked to her client before August 5, 2012. The statement was highly beneficial to her client. Later, however, her client told her that the witness was confused and had forgotten about an earlier meeting in March. She realizes that the witness had, by inadvertence, made a false statement on a major factual point.

- a. Because Morelli now knows her witness testified falsely, she has a duty to take reasonable remedial measures—if necessary, disclosure to the tribunal.
- b. Morelli would *not* have a duty to take remedial measures unless she knew that the witness made the statement with knowledge of its falsity.

- c. Morelli would *not* have a duty to take reasonable remedial measures unless she knew at the time the witness testified that the statement was false.
- d. Because of Morelli's duties of confidentiality and loyalty to her client, she is not permitted to discredit or withdraw testimony that is beneficial to her client.

35 Nimmitz represents Tubbs who is charged with a robbery allegedly committed with an accomplice. Tubbs confidentially admitted the crime to Nimmitz. The victim says the robbery occurred at 8:00, but Nimmetz has obtained a video from an ATM machine a mile away showing Tubbs and another trying to make a withdrawal at 7:58. There's no way Tubbs could have covered the distance from the ATM to the place of the robbery in 2 minutes. Nimmitz thinks the victim is wrong about the time of the robbery but he wants to introduce the ATM video anyway. Most lawyers would probably say:

- a. Nimmitz can properly introduce the ATM video as evidence that Tubbs could not have been at the place of the robbery at 8:00.
- b. Nimmitz can *not* properly introduce the ATM video as evidence that Tubbs was not at the place of the robbery at 8:00.
- c. If the accomplice's lawyer introduces the ATM video as evidence that Tubbs was far from the place of the robbery at 8:00, Nimmitz must take reasonable remedial measures.
- d. Both b. and c. above.

36 Nimmitz represents another client, Vorst, charged with robbing a convenience store. Vorst has confidentially admitted the robbery to Nimmitz, and the store clerk has ID'd Vorst as the robber. However, a customer who happened to be in the store during the robbery says that, even though the robber looked a lot like Vorst, he's sure it was a different person. The customer seems to really believe this. Most lawyers would probably say:

- a. Nimmitz can properly call the customer to testify that Vorst was not the robber.
- b. Nimmitz can properly call the customer to testify that the robber looked a lot like Vorst but he's sure it was a different person.
- c. Both of the above.
- d. None of the above.

37 When Walter Garrison was arrested for assault (with a beer bottle), he had a long scraggly beard, a dirty mop of hair pulled back in a pony tail and wore a black leather jacket decorated with KKK and Nazi insignia, among other things. His lawyer told him to make some changes in preparation for trial. Which of the following would have been generally considered improper for the lawyer to suggest?

- a. Get a haircut.
- b. Shave off the beard.

- c. Get a conservative business suit and tie, and wear it to court.
- d. None of the above would be generally considered improper.

38 During his trial for attempted murder, Howland tells his lawyer that he wants to testify that the victim swung a heavy piece of pipe at Howland’s head before Howland shot him. Based on all his previous conversations with Howland, the lawyer thinks this is a fabrication. It would be marginally ethical for the lawyer to knowingly help Howland commit perjury:

- a. If failing to help would reveal a client confidence protected by the attorney-client privilege.
- b. If failing to help would, in effect, penalize the client for previous confidential, full and frank communication with the lawyer concerning the case.
- c. If failing to help would violate an explicit instruction from the client to the lawyer.
- d. None of the above. It is improper for a lawyer to help a client commit perjury under any circumstances.

39 Suppose in the preceding question Howland admits to his lawyer that he intends to commit perjury. The first thing that the lawyer should do is:

- a. Inform the judge.

- b. Try to withdraw from the case.
- c. Try to persuade Howland to tell only the truth in his testimony.
- d. Consider how to make the perjured story look plausible and believable as possible.

40 Suppose in the preceding question Howland told his lawyer he intended to commit perjury and the lawyer decided to try to persuade him not to. After finding himself unable to persuade Howland, the lawyer informed the court of Howland’s expressed intention to lie on the stand. In doing so:

- a. The lawyer denied Howland effective assistance of counsel.
- b. The lawyer acted properly.
- c. The lawyer gave Howland a cause of action against the lawyer for malpractice.
- d. The lawyer violated the rule of confidentiality and became subject to discipline for breach of his duty of loyalty.

41 In general, a lawyer should refuse to help a client testify to a particular “fact” that the lawyer thinks is false:

- a. Only if the lawyer has a firm factual basis for disbelieving the proposed testimony or actual knowledge that it would be false.

- b. Whenever the lawyer has reasonable grounds to disbelieve the veracity of the testimony that his client proposes to give.
- c. In any case where the lawyer cannot say that he or she honestly believes the testimony is actually true.
- d. Only if the testimony would be harmful to the client or otherwise against the client's best interests.

42 In zealously and diligently representing a client within the bounds of the law and ethics, a lawyer should generally:

- a. Refrain from discussing possible testimony with witnesses prior to the trial.
- b. Refrain from coaching witnesses while, nonetheless, preparing them for the questioning they will encounter on the stand.
- c. Do everything possible to keep any witnesses with possible unfavorable testimony from talking to the other side (unless they're legally compelled to do so).
- d. Make sure the witnesses the lawyer plans to call to testify are told exactly what they are and are not to say.

43 In a criminal case where a defendant wanted to give perjured testimony in order to prove self-defense, the U.S. Supreme Court held that:

- a. The constitutional right to counsel does not entitle defendants to a lawyer's assistance in presenting such testimony.
- b. The lawyer should let the client testify as he wishes but should do so using the "narrative" approach so that the lawyer does not actively assist in the perjury.
- c. The lawyer should not interfere with the client's desires if doing so would violate the lawyer's duty not to use confidential information against the client's interests.
- d. The Supreme Court is the highest and final arbiter of what the ethical rules require.

44 Rick and Dave, college roommates, were driving to Detroit. Their car hit a pedestrian while Rick was at the wheel. The pedestrian sued Rick for damages. Rick's lawyer strongly urged both Rick and Dave not to talk about the accident with "anyone" representing the other side unless compelled to do so by court order or judicial process:

- a. The lawyer is subject to discipline for urging Rick not to talk "anyone" representing the other side.
- b. The lawyer is subject to discipline for urging Dave not to talk "anyone" representing the other side.
- c. Both of the above.

d. It would have practically been malpractice for Rick’s lawyer *not* to urge both Rick and Dave not to talk “anyone” representing the other side.

45 During cross-examination at a jury trial, Norbert Ryan was asked: “Did you leave the house at any time during the evening of March 25?” Norbert remembered that he *had* left for about 20 minutes to buy a magazine at around 8:30 p.m., but his answer was: “My wife and I were fixing dinner and needed eggs so she went to get a carton of eggs at the dairy store down the street.” In fact, Norbert’s wife had gone out for eggs just as he testified.

- a. If Norbert has misled the jury, he is probably guilty of perjury.
- b. Norbert has told a lie and is probably guilty of perjury.
- c. Because Norbert gave a non-responsive answer, he is probably guilty of perjury.
- d. Norbert has not told a lie and is probably not guilty of perjury.

46 During cross-examination Norbert was also asked: “Did you communicate with Dixon at any time following your meeting in Barcelona?” Although Norbert had received an email from Dixon on a topic totally unrelated to the litigation, he hadn’t responded to it, nor was any other contact with Dixon. Norbert knew what the questioner was getting at—that he was trying to lay the groundwork for raising an unfavorable

inference against Norbert. However, not wanting to play into the questioner’s hands, Norbert answered with a simple: “No.”

- a. Since Norbert’s answer was truthful based on an objectively reasonable interpretation of the question, it probably should not be considered perjury.
- b. Norbert’s answer was probably not perjury and there’s no reason why his lawyer shouldn’t have counseled him to evasively answer “no” to the question.
- c. Both of the above.
- d. Since Norbert knew what the questioner was getting at, his answer should probably be considered perjury.

47 Zelnick has a young client who is charged with possession of methamphetamine. Because his client has a clean record and has voluntarily undergone a treatment program while out on bail, Zelnick would like to argue for leniency at the sentencing hearing. The day before the sentencing hearing, however, his client admitted to him confidentially that he’d secretly used meth a couple of times after completing the treatment program. Most lawyers would probably agree that Zelnick can properly argue that his client:

- a. Has completed a treatment program and has not used controlled substances at any time since.
- b. Has completed a treatment program and nothing in the record shows that he’s used controlled substances at any time since.

- c. Both of the above.
- d. None of the above.

48 Wainright represents the defendant in a breach of contract case. One of the plaintiff's witnesses has just testified that Wainright's client failed to perform various obligations under the contract. He spoke of breaches on five separate days, all of them over two years earlier. The client tells Wainright that the witness is telling the truth but Wainright is convinced that, by skillful questioning on cross-examination, he can confuse the witness as to particular dates and defaults and thereby set up a basis for arguing to the jury that the witness cannot be believed. Most would agree that:

- a. It would be improper for Wainright to deliberately damage the credibility of testimony he believes is probably truthful.
- b. It would be improper for Wainright to pass up a legitimate opportunity to discredit testimony that is damaging to his client.
- c. Wainright should try to get the witness to retract some or all of his testimony but should not discredit what he believes is probably true.
- d. Wainright may closely question the witness for inconsistencies in his testimony, but he should not impeach a truthful witness.

49 Bob Heller has a client being sued for breach of contract. The client admits that he breached but tells Bob that the

damages award could be financially catastrophic and he wants Bob to do everything possible to avoid such a possibility. At very least he wants Bob to slow the proceedings down by making motions, asking for additional time, etc. Bob does this. Then, due to the fortuitous death of a key witness, Bob realizes that the plaintiff probably no longer has admissible evidence needed to prove its case.

- a. Since Bob knows his client has in fact breached the contract, it would be frivolous to put the other side to its proof (require it to produce evidence of the breach).
- b. Bob's duty of good faith to the court requires him to stipulate to facts that the testimony of the deceased witness would have established.
- c. Both of the above.
- d. According to the blackletter of the Model Rules, Bob's delaying tactics were, under the circumstances, arguably proper.

50 Gail Mellia is a junior prosecuting attorney assigned to a case against Darrel Lexcott, a teenager charged with acting as lookout in a convenience store robbery. Darrel vigorously denies guilt. Mellia was reviewing the evidence file when she noticed an eyewitness statement from a customer in the store. He says that he clearly saw the lookout and he had a "barcode" tattoo on the back of his neck. Darrel has no such tattoo. Based on this, Mellia strongly doubts that Darrel is guilty, but the store clerk stands by his line-up identification. In this situation, Mellia should:

- a. Abandon the prosecution and dismiss the charges against Darrel because she no longer has the requisite belief that he is guilty.
- b. Provide a copy of the eyewitness's statement to Darrel's lawyer to use for the defense.
- c. Determine if Darrel's lawyer is aware of the eyewitness's statement and, if not, take care that he does not find out about it.
- d. Zealously represent the interests of the state in doing everything possible to obtain a conviction even if there's no longer probable cause.

51 Dora handed \$20 to Clara and said: "While you're out shopping, please buy me some lottery tickets." Clara said "OK," and bought \$30 worth of tickets (\$10 worth for herself). Before Clara got around to dividing up the tickets, the drawing was held and one of the tickets won \$2,000,000. Dora and Clara dispute who owns the winning ticket and the state lottery office refuses to pay. Dora and Clara ask Madeline Hines, Esq. to represent them suing the state.

- a. There is no obvious reason why there would be any ethical problem with Hines representing both Dora and Clara.
- b. It looks like Hines may have a conflict of interest if she tries to represent both Dora and Clara.

- c. As long as Dora and Clara consent to having Hines represent them both, there is no reason why she could not ethically do so.
- d. If Hines represents both women, conversations among the three of them would not be protected by privilege due to the presence of an unnecessary third party.

52 For over 20 years Tinsdale has represented Wycliffe, a local businessman and gentleman farmer who owns a large piece of land. In one of its wooded corners, there's an area that Tinsdale wants to buy for a weekend home. Wycliffe says he's happy to accommodate. The two agree on the boundaries and a price, and Wycliffe suggests: "You can do the lawyer stuff for both of us. Write up the legalities in a contract, and I'll gladly sign it." Tinsdale assents but then driving back to his office he suddenly has second thoughts about whether it would be proper for him to draft up the contract of sale.

- a. Tinsdale *should* have second thoughts. He has a serious conflict of interest that he needs to deal with here.
- b. If Tinsdale gets another lawyer to represent Wycliffe in the sale, that would eliminate any problem of conflict of interest.
- c. Both of the above.
- d. Tinsdale should have second thoughts because, as a lawyer, he's not allowed to enter into business transactions with his own clients.

53 Vivian Maris works in a legal services office and represents tenants in dispossess proceedings. She will appear in court tomorrow with one of her clients and expects to get the client, a single mom, an extension of 2 months to stay in her apartment. This morning the client called and said “Thanks for everything, but it looks like I’ll have to leave the apartment anyway,” explaining that she was robbed the previous night and, for lack of funds, has to move in with her sister. Vivian tells her client that she’ll lend her \$600 for living expenses to tide her over so she won’t have to abandon her legal defense and lose the apartment. If Vivian lends her client the \$600.

- a. Vivian has violated the Model Rules.
- b. Vivian has acted in an unusually ethical way, even for a lawyer.
- c. Vivian has only done what any good and ethical lawyer would be likely do in similar circumstances.
- d. Vivian has acted in a way that is clearly permitted but not required under the Model Rules.

54 Winship practices criminal law. While at the courthouse to do an arraignment, he was approached by a man who offered him a \$125,000 cash retainer to represent a guy named Rodney Quidd who was being held for possession with intent to sell. “Only one condition,” the man said. “No guilty pleas and no deals with the prosecution. Quidd has to go to trial.”

- a. Winship cannot properly agree to this arrangement because a lawyer may not take payments of fees from anyone but the client.
- b. The condition would raise no ethical questions as long as the fee-payor pays on time.
- c. If Winship agrees to accept his fee from someone other than the client, he is ethically bound to keep the fee-payor apprised of the details as the case progresses.
- d. Winship can ethically accept fees from a non-client but he may not let the fee-payor dictate conditions like insisting that the case go to trial.

55 Laura is a lawyer in the prosecutor’s office; Dave works for Legal Aid. They are in a relationship but, because Laura is still married to Steve, they’re keeping it a secret. Laura’s boss has just assigned her to prosecute McCann. By coincidence, Dave’s office has assigned Dave to defend him. Probably either Dave or Laura will be able to shift the case to another lawyer in the office, but that could take time. Meanwhile, there will be an arraignment and bond hearing, various motions, etc. where Dave and Laura will be adversaries in court. For Dave and Laura to represent opposite parties in the same case:

- a. Is expressly prohibited by the Model Rules.
- b. Would probably be regarded as improper under the “materially limited” provision of the rule on concurrent conflicts.

- c. Probably raises no question under the Model Rules since they are not related by blood or marriage.
- d. Is nobody's business but theirs, and they should just go ahead and do it.

56 Huston was retained by the seller and buyer to handle the legalities in the sale of a small business. The terms of sale were \$1 million payable at the transfer of assets plus \$3 million additional payable over five years. Two years after the transfer of assets, the buyer went bankrupt, defaulting on \$2.25 million still owed the seller. The seller has sued Huston for malpractice alleging that, with different terms in the contract, the seller could have been protected. It is contested, however, whether an "ordinarily prudent" lawyer would have necessarily insisted on some or all of those terms that the seller now says should have been there.

- a. When the jury assesses whether Huston met the standard of care in protecting the seller's interest, a conflict of interest like Huston's can make a difference.
- b. Many courts have said that a lawyer is liable for any loss sustained by a client whenever there was a serious conflict of interest, irrespective of negligence.
- c. The conflict of interest would be generally irrelevant to a determination of Huston's liability to the seller.
- d. As long as the buyer and the seller both went ahead knowing that Huston was, in effect, representing both, there was no conflict of interest problem

57 When Delray sold his home in 2014, Nesbitt represented him. After the closing, Nesbitt formally terminated his representation of Delray because Delray didn't pay the agreed fee. Last week, the people who bought Delray's house, Nick and Mary Cuthbert, came to Nesbitt and said they wanted to retain him to sue Delray for rescission of the sale because Delray had seriously misrepresented the condition of the property. Delray objects to the representation.

- a. Nesbitt is the perfect choice to represent the Cuthberts because he is already well informed about the matter.
- b. Nesbitt may properly represent the Cuthberts but should charge a reduced fee because he already knows all about the matter.
- c. There's no problem with Nesbitt representing the Cuthberts as long as he does not disclose confidential information relating the representation of Delray.
- d. Nesbitt may not properly represent the Cuthberts without informed consent from Delray.

58 Professor Leecham, a renowned authority on the Rule Against Perpetuities, was retained to draft an "airtight" perpetuities clause for the will of Mabel Rasswell, now deceased. Leecham never met Mabel personally and his work on her will was "a pure drafting job" based solely on his expertise. Mabel's nephew, Leander Frith, now wants to challenge her will and he has retained Leecham to find a flaw in the clause that Leecham drafted.

- a. As long as Leecham received no confidential information in his representation of Mabel, there's no reason why he should not represent Leander.
- b. Most would probably say that Leecham has a successive conflict in representing Leander even if he has no confidential information concerning Mabel.
- c. While it may appear improper to represent Leander, a mere appearance of impropriety is not relevant to disqualification for conflict of interest.
- d. There is no successive conflict here because Leander's interest is not "directly adverse" to Mabel's.

59 A partner in the East Coast office of Williams & Craft has been approached by a prospective client who wants to bring an action against Clermont Corporation for breach of a long-term supply contract. It looks like a very lucrative case. Suppose, however, a conflicts search in the firm reveals that a partner in the firm's West Coast office does all of the labor and employment work for the Los Angeles branch of Clermont (work that is totally unrelated to the breach of contract case).

- a. Williams & Craft probably could not properly represent the prospective client in the breach of contract suit even if it gets informed consent from Clermont.
- b. There is a strong possibility that Williams & Craft could be disqualified from representing the prospective client in the breach of contract suit.

- c. Both of the above.
- d. It is probably fine for the East Coast partner to represent the prospective client in the breach of contract suit as long as the West Coast partner is not involved.

60 Assume now that a partner in the East Coast office of Williams & Craft has been approached by a prospective client who wants to bring an action against Shipwood Corporation for tortuous interference. This time, suppose a conflicts search within the firm reveals that, in 2012, a partner in the firm's St. Louis office consulted on a tax issue for Shipwood's Midwest branch. However, the tax work was completed long ago and was totally unrelated, factually and legally, to the facts behind the tortuous interference claim.

- a. On these facts there appears to be no reason why Williams & Craft could not properly represent the prospective client in the tortuous interference suit.
- b. Without Shipwood's informed consent, Williams & Craft probably could not properly represent the prospective client in the tortuous interference suit.
- c. There's a real likelihood that Shipwood could get Williams & Craft disqualified from representing the prospective client in the tortuous interference suit.
- d. Williams & Craft appears to have an irresolvable conflict of interest preventing it from representing the prospective client in the tortuous interference suit.

**<End of examination>**

