

## PACE UNIVERSITY SCHOOL OF LAW

PROFESSIONAL RESPONSIBILITY  
PROFESSOR HUMBACH  
FINAL EXAMINATION

December 15, 2010  
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 65 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.

**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. Glenn Wiscott is a lawyer with over 40 years experience in the area of corporate and securities law. One of Wiscott's corporate clients has asked Wiscott to represent him in a matrimonial matter. Wiscott has never done matrimonial law in his life. May Wiscott properly accept this assignment?

- a. No.
- b. Yes, if he first obtains special training.
- c. Yes, if competence can be achieved by reasonable preparation.
- d. Yes, but only if he associates with another lawyer who is experienced in matrimonial of law.

2. Louise Cole was celebrating her admission to the bar with some friends. On the way home, one of them was stopped and taken into custody for DWI. Louise received her panicked call from the police station. It's now 3:00 am, and Louise plans to start looking for an experienced DWI lawyer first thing in the morning. Meanwhile, her friend has several questions that just can't wait.

- a. It is presumed that, as a newly admitted lawyer, Louise is not ready represent clients. She should tell her friend that her questions will just *have* to wait.
- b. A newly admitted lawyer can never be just as competent as a practitioner with long experience, so Louise should hold off answering her friend's questions.

- c. Before answering any questions, Louise should obtain her friend's agreement (with informed consent) not to sue for malpractice in case Louise makes a mistake.
- d. In an emergency, Louise may answer questions outside her area of expertise, but she should limit such representation to that which is reasonably necessary.

3. Rory Dembock is a criminal defense lawyer. He often represents people that he knows are almost certainly guilty. In order to maintain his objectivity, Rory never asks the client if he "did" the act in question. Indeed, he makes clear to his clients that he doesn't want to know. Is Rory's mode of practice in compliance with the Model Rules?

- a. Yes. A big part of a lawyer's interviewing skill is knowing what *not* to ask.
- b. No. A lawyer is required to be thoroughly prepared with respect to both the law and the facts.
- c. Yes. One of the best ways for a lawyer to avoid getting his hands tied by possible perjury is to know nothing that could be create a conflict of interest or otherwise limit the lawyer in representing the client's best interest.
- d. No. A criminal defense lawyer has a duty to be candid with the court. This means getting to know the true facts so the court won't be misled concerning the client's guilt.

**Facts for Ariel Gordon questions:** Last week, Ariel Gordon conducted a cross-examination of a key witness against her client. Due to the pressures of other matters, she got to court without having had a chance to prepare. She considered asking the judge for a half-

hour recess, but she decided that it would be tactically better just to wing it. The cross-examination went pretty well, but the opposing lawyer was startled when Ariel failed to follow up on a very fishy contradiction in the witness's testimony. Looking back, that failure might have been the mistake that cost her the case.

4. Under these circumstances:
  - a. Ariel has violated her ethical duty of competence.
  - b. Ariel is likely to face discipline for incompetence.
  - c. Both of the above.
  - d. There is no basis for saying that Ariel acted incompetently because her decision not to ask the judge for a recess was a valid tactical judgment.
5. Having noticed Ariel's failure to follow up on cross-examination:
  - a. The opposing lawyer had an ethical duty to point out the obvious blunder, so she'd have a chance to correct it.
  - b. The opposing lawyer had no ethical duty to point out Ariel's blunder, but most lawyers would probably agree it would have been the right thing to do.
  - c. Most lawyers in the opposing lawyer's situation would sit back and not interfere with Ariel's representation of her own client (and would not point out the blunder).

- d. A lawyer in the opposing lawyer's situation would have an ethical duty to report Ariel's blunder to the disciplinary authorities, and many would probably do so.

6. Suppose that Ariel's client was a criminal defendant. Suppose also that, in a distracted moment, Ariel tells the client that she hadn't had time to prepare the cross-examination but chose not to ask the judge for a short recess. Her client (now convicted and in prison):
  - a. Probably has a good case for getting a new trial due to the incompetence of his lawyer.
  - b. Probably has a good case for getting damages in a malpractice action due to the incompetence of his lawyer.
  - c. Both of the above.
  - d. Probably will end up suffering the consequences of his lawyer's incompetence.
7. Jay Bosco is Pantheon Corp.'s lawyer in an action to enforce a sales contract. During discovery, Jay failed to provide a letter that the other side had demanded as part of a request for "all correspondence relating to" a certain transaction. He did so for tactical reasons, because he didn't want the opposition's lawyer to have advance access to the names of certain individuals referred to in the letter. At trial, the court sanctioned Jay by ruling the letter inadmissible. As a result, Pantheon lost a case it probably would have won.
  - a. The court's ruling was in error. A client cannot be made to suffer because its lawyer breaks the rules.

- b. The court's ruling was error if Pantheon could prove that Jay withheld the letter on his own, without consulting Pantheon.
- c. The court's ruling was error if Pantheon could prove that Jay withheld the letter in violation of a direct instruction from Pantheon.
- d. Pantheon is almost certainly stuck with the consequences of its attorney's conduct.

8. In the preceding question, if Jay had failed to provide the letter to the other side due to carelessness or honest misunderstanding:

- a. The answer would be the same.
- b. The court could not make the client responsible for the lawyer's non-culpable mistake.
- c. The court would require the attorney-client privilege to be waived.
- d. The court would not hold Pantheon responsible for the mistake because Jay was Pantheon's lawyer and not its "agent."

9. Ora Landoff was suing her stockbroker for mishandling her account. She told her lawyer that she'd settle for anything over \$300,000 "but not a dime less." The lawyer later received a settlement offer of \$295,000 from the stockbroker's lawyer, who added: "This is our final offer. Take it by 5 o'clock today or it's off the table and we're going to trial." Ora's lawyer, concerned that some of her evidence might not stand up in court, grabbed the offer

and settled in the belief it was probably the best deal Ora could get. Is Ora bound by the settlement?

- a. Yes, if the Ora had previously given the other side reason to believe that her lawyer had authority to settle at his discretion.
- b. Yes, if Ora's lawyer had previously done things to confer himself with apparently authority.
- c. Both of the above.
- d. Yes, because lawyers always have actual or inherent authority to settle on their client's behalf.

10. In the preceding question, if Ora's lawyer did not have actual authority to settle for less than \$300,000:

- a. He would be liable to Ora (if she can prove damages).
- b. The settlement might still be binding on Ora.
- c. Both of the above.
- d. He would have surely had at least "apparent authority" on these facts.

11. In discussing various aspects of the case with the lawyer for the other side, Ora's lawyer should bear in mind that:

- a. Any statements he makes about the facts of the case might be used against Ora.

- b. As between lawyer and client the decision whether to settle is for the client to make under the Model Rules.
- c. Ora has told him she would not take “a dime less” than \$300,000.
- d. All of the above.

12. When stopped for a routine traffic violation, attorney Howard Rand was arrested for possession of cocaine. A packet had fallen from his wallet as he was getting out his license and registration. The assistant district attorney, Rand’s former law school classmate, has offered a plea deal. A condition of the plea deal is that Rand record a conversation with a former client, Ellis, and attempt to get Ellis to make inculpatory statements. If Rand agrees:

- a. He is to be commended for cooperating with the law enforcement authorities.
- b. He would not be committing any ethical violation as long as the lawyer-client relationship with Ellis had lapsed.
- c. Both of the above.
- d. He risks professional discipline for using deception and trickery in taking advantage of Ellis’ trust.

13. According to the Model Rules and comments, there are several situations in which a lawyer is supposed to abide by the decision of the client. Which of the following decisions is *not* among them:

- a. Whether to settle.
- b. Whether to plead guilty.

- c. Whether to object to damaging evidence.
- d. Whether the client should testify (criminal trial).
- e. Whether to waive a jury trial.

14. Lisa Warbler does insurance defense work for Iota Insurance Co. Tom Peterson, one of Iota’s insureds, was involved in a car crash. Lisa has been assigned to defend him. When Tom describes the facts to Lisa, she realizes that he may have a personal injury claim against the ambulance service that came to the scene. As a matter of office policy, however, Lisa never does personal-injury plaintiff’s work:

- a. Lisa should not mention the possible claim to Peterson because then he might insist that she handle it for him.
- b. Lisa could well be liable in malpractice if she doesn’t tell Peterson about the possible claim and advise him to seek a lawyer to look into it.
- c. As long as she makes clear that she only represents Tom under his insurance policy. Lisa could not be liable in malpractice with respect to the ambulance claim.
- d. Lisa may not limit her representation to only some of the issues arising out of the car crash; so she cannot ethically avoid handling the ambulance claim.

15. Arthur Tynset represents Browne in connection with a real estate partnership. Last week, Jacob Jasper came to see Tynset and wants to retain him for a proposed development deal. The legal fees would be very lucrative. The problem is that Tynset’s deal involves inducing a landowner to break a contract that he has with Browne. Tynset cannot

represent both Browne and Jasper because of the prohibition on conflicts of interest. He wants to terminate his representation of Browne.

- a. There is no way he can do so under the Model Rules.
- b. He can do so if he makes sure there is no material adverse effect on Browne.
- c. He can do so any time he wants, so long as he does not have any confidential information relating to Browne.
- d. He cannot do so unless Browne has used or is about to use his services in the pursuance of fraud or criminal activities.
- e. He can do so as long as his representation of Browne would be repugnant to his representation of Jasper.

16. Edgware was down at the jail talking with Roe, a client who was about to get out on bail. Roe client told Edgware: "When I get out the first thing I'm going to do is find that snitch who put me here and slap her face." Edgware counseled against this and Roe assured that he wasn't going to do anything "serious," just teach her a lesson. Edgware believes that, unless he reports the threat, Roe might well carry it out. According to the Model Rules:

- a. Edgware must report Roe's threat.
- b. Edgware *must* report Roe's threat, but only if he thinks Roe is likely cause a serious injury to the snitch.
- c. Edgware *may* report Roe's threat if he thinks Roe is likely to cause a serious injury to the snitch.

d. Under no circumstances should Edgware breach his client's confidentiality.

17. The attorney-client privilege:

- a. Is just another (and more common) name for the lawyer's ethical duty of confidentiality.
- b. Is a rule of law (of evidence) and can be invoked to prevent testimony from being compelled in court.
- c. Applies to all information "relating to the representation" of the client and forbids the lawyer from revealing such information.
- d. All of the above.

18. While having lunch at the Mayfair, Reynolds noticed that Brewer (a recovering alcoholic) had a glass of wine. A few days later, Brewer was involved in an automobile accident. Brewer's insurance company retained Reynolds to handle the resulting lawsuit. In private consultation with Reynolds, Brewer stated that he'd "taken a drink now and then" over the past few months, including (most recently) the glass of wine at the Mayfair. Can the prosecutor require Reynolds to testify against Brewer concerning the drink at the Mayfair?

- a. Reynolds cannot be forced to testify about the drink at the Mayfair because that information is protected by the attorney-client privilege.

- b. Reynolds cannot be forced to testify about the drink at the Mayfair because that information is protected by the ethical duty of confidentiality.
- c. Both of the above.
- d. Reynolds *can* be forced to testify that Brewer told him about the drink at the Mayfair because that information, being public, is not protected by the attorney-client privilege.
- e. Reynolds *can* be forced to testify about seeing Brewer have the drink at the Mayfair but not that Brewer told him about it.

19. In the preceding question, the insurance company is (as per the usual practice) paying the entirety of Reynolds' fee in connection with the defense of its insured, Brewer.

- a. Reynolds should not tell the insurance company that Brewer had the drink at the Mayfair without Brewer's informed consent.
- b. Reynolds is free to tell the insurance company that Brewer stated in the private consultation that he'd had the drink at the Mayfair.
- c. Reynolds should promptly tell the insurance company that Brewer had the drink at the Mayfair.
- d. Reynolds should tell the insurance company what Brewer stated in the private consultation only if the insurance company demands this information.

20. During an interview at the jail, Lora Sarben's new client asked her, among other things, if she could get somebody to take care of his car, which was parked on the street. Lora asked her investigator to move the car to a secure location. While moving the car, the investigator noticed a piece of paper containing several addresses, including the address of the antique shop that the client is accused of burglarizing. The investigator took the piece of paper to Sarben.

- a. It is clear that Sarben should promptly turn the piece of paper over to the prosecutor.
- b. Under no circumstances should Sarben ever do anything that would obstruct the prosecutor's access to evidence or conceal a document or other material having potential evidentiary value.
- c. Sarben should destroy the piece of paper to keep it from possibly being used against her client.
- d. Despite the attorney-client privilege, Sarben's investigator could be forced to disclose where he found the piece of paper.

21. Suppose in the preceding question that the investigator, while moving the car, also found a small brooch hidden in the glove compartment. From its unusual design, he recognized it as one of the items that the police say was stolen during the burglary. He brings the brooch to Sarben at her office and tells her where he found it.

- a. Sarben should promptly dispose of the brooch to keep it from possibly being used against her client.
- b. It would be wrong for Sarben to silently keep the brooch.

- c. The duty of confidentiality would prohibit Sarben from telling the prosecutor or police that she has the brooch.
- d. Under the attorney-client privilege, Sarben could not be required to reveal that she has the brooch or where she got it.

22. It has recently emerged that MacBeale Mortgage Co. made mortgage loans to unqualified borrowers. MacBeale has just received notice that is under investigation for creating fraudulent paperwork to make these borrowers look creditworthy. Two lawyers from Fredd & Jordie, MacBeale's regular law firm, visited MacBeale employees to "discuss the investigation." They assured the employees that their conversations were protected by the attorney-client privilege. Later, using statements that the employees made to the two lawyers, MacBeale cut a deal with prosecutors for a favorable plea bargain in exchange for "cooperation" in prosecuting its (now former) employees.

- a. Under the *Upjohn* test, the two lawyers' conversations with the employees were probably protected by the attorney-client privilege.
- b. There was nothing wrong or improper about the two lawyers assuring the employees that their conversations were "protected by the attorney-client privilege" if, in fact, they were.
- c. Both of the above.
- d. As counsel for the company, the two lawyers presumptively represented the employees as well.
- e. All of the above.

23. During conversations with the two lawyers from Fredd & Jordie (MacBeale's law firm), several MacBeale employees admitted that they sometimes fabricated the employment and income information on borrowers' loan applications. Now, government regulators are attempting to interview these same employees to get information about possible fabrications on applications. MacBeale is objecting to these attempts, citing the *Upjohn* rule.

- a. Under the attorney-client privilege, the employees cannot be forced to discuss with the regulators any acts of falsification that they have previously disclosed in confidential conversations with the lawyers for Fredd & Jordie.
- b. Under the attorney-client privilege, the employees cannot be forced to discuss tell the regulators about any statements they made to the two lawyers with respect to acts of falsification done in the course of their employment.
- c. Both of the above.
- d. None of the above. The *Upjohn* rule would not stand in the way of the government regulators in their efforts to get information from the employees.

24. According to the Supreme Court in *Upjohn*, an important concern in defining the extent of a corporation's attorney-client privilege is:

- a. To assure that only those in control of the corporation have access to the privilege.



- b. To assure free and frank communication between the corporation's counsel and those employees who have relevant information or who would implement the resulting legal advice.
- c. To limit the ability of outsiders to intrude into the internal affairs of a private corporation.
- d. All of the above.

25. Patrick Downs is a lawyer in the legal department of Atkins Corporation. He has learned that certain Atkins employees are improperly disposing of hazardous waste in violation of Federal law. He expressed his concerns to the General Counsel and was told that he should "pay attention to his assigned work and not let his mind wander to matters that aren't his affair." He is sure that, if he becomes a whistleblower, he'll be fired.

- a. Traditionally, the courts have allowed retaliatory discharge actions by lawyers like Downs who report serious wrongdoing by their corporate employers.
- b. Traditionally, the courts have not required corporations to compensate disgruntled legal employees who are fired for breaching confidentiality and reporting wrongdoing.
- c. If Downs blows the whistle and is discharged, a good compromise would be to allow him to sue for retaliatory discharge but prohibit him from disclosing any confidential information in pursuing his claim.
- d. The American Corporate Counsel Association has come out strongly in favor of protecting corporate house counsel who report serious corporate wrongdoing.

26. Thompson was talking with a new client in his office. He assured the client that "nothing you say will leave this room." In so saying, Thompson omitted mentioning several circumstances in which the client's statements need not be held confidential. Which of the following is generally *not* among them?

- a. Attorney-client confidentiality generally does not survive the death of the client.
- b. Attorney-client confidentiality generally does not survive termination of the lawyer-client relationship.
- c. Attorney-client confidentiality never applies when disclosure of a material fact is necessary to prevent fraud by the client.
- d. Attorney-client confidentiality generally does not apply if disclosure is necessary to permit the lawyer to collect his fee from the client.

27. Gibby Horton was arrested and charged with robbery. He wants to plead not guilty and testify on his own behalf. His lawyer, Colin Phillips believes he should plead guilty because the prosecution's case is very strong and the deal offered by the prosecution is a good one. Phillips is also convinced that Horton will make a terrible witness and be easily impeached because of his criminal record of prior assaults.

- a. Horton's decision controls on the plea, but it's up to Phillips to decide whether he'll testify.
- b. Phillips' decision controls on testifying, but it's up to Horton to decide whether to accept the plea deal.

- c. Horton's decision controls on both testifying and the plea deal.
- d. Phillips' decision controls on both testifying and the plea deal

28. Horton is convicted of robbery and Jane Winston handles the appeal. Horton sends Winston a list of ten issues that he wants Winston to cover in the brief. Winston chooses three of these, adds two of her own, and does not mention the rest of Horton's issues. Horton's conviction is affirmed.

- a. Because Winston refused to follow Horton's direct instructions, Horton has been denied effective assistance of counsel and would probably get a new trial on that ground.
- b. Winston's failure to follow Horton's instructions did not deny him effective assistance of counsel because her primary role to put on the best case possible according to her own professional judgment.
- c. Winston's failure to follow Horton's instructions denied him the right to be master of his own cause (and, therefore, denied him effective assistance of counsel), but he probably would not get a new trial on that ground.
- d. Because Winston failed to carry out Horton's direct instructions, he would probably be able to recover substantial damages in a malpractice action.

29. Eileen Tompkins has been hired by Gary Parker to represent his fiancée who's just been arrested for DWI. Gary will pay the legal fees. The fiancée tells Tompkins privately that she's worried because there's an arrest warrant out for her in a nearby state where she

skipped bail on a "bogus" shoplifting charge. She's afraid that Gary will dump her if he ever finds out about it.

- a. Tompkins should promptly relay this information to Gary under her duty to communicate with her client.
- b. Tompkins should not be accepting payment from Gary to represent his fiancée because the situation is rife with conflicts of interest, such as this one.
- c. Tompkins should keep the information about the prior arrest and warrant confidential, and not even tell Gary.
- d. Tompkins should keep the information about the prior arrest and warrant confidential, except to relay it to Gary.

30. Hawthorne represents a developer in land use regulation matters including, currently, a large and complex zoning lawsuit. Over the years, the developer has been a lucrative client. Today, Rory Simms asked Hawthorne to represent him in a personal injury action against the developer arising out of a traffic accident with one of the developer's trucks. There is no connection between the personal injury case and the zoning lawsuit.

- a. Hawthorne may not handle the personal injury matter because that representation would be directly adverse to the representation of the developer.
- b. Hawthorne may go ahead and represent Simms because there is no connection between his case and the zoning lawsuit.

- c. Hawthorne may go ahead and represent Simms as long as both Simms and the developer give informed consent, confirmed in writing.
- d. Hawthorne may go ahead and represent Simms as long as he believes that he will be able to provide competent and diligent representation to both Simms and the developer.

31. Again, Hawthorne represents a developer in land use regulation matters. The developer has offered Hawthorne an opportunity to invest in a small land deal, a joint venture among the developer, Hawthorne and two other investors. The developer has already set the terms of the deal, and he asks Hawthorne just to “put it into legalese.”

- a. There is no way that Hawthorne can ethically get involved in this business transaction with his own client.
- b. It would raise no ethical concerns for Hawthorne to get involved in this business transaction with his own client as long as he tells the client that he is not representing the client for purposes of this transaction.
- c. It would raise no ethical concerns for Hawthorne to get involved in this business transaction with his own client as long as the client has already set the terms of the deal.
- d. None of the above.

32. Hawthorne also represents an inventor and his small corporation, which manufactures and sells one of the gizmos he invented. Due to the recession, the corporation has severe cash-flow problems, but it has a patent infringement action against Biggiant, Inc. Apparently the infringement was inadvertent, and a Biggiant is almost certain to

work out a deal once the suit begins. Hawthorne wants to lend his client \$170,000 to cover ordinary business expenses until the settlement is reached with Biggiant. Such a loan:

- a. Would be ethically prohibited.
- b. Would be ethically permissible as long as the client proposed it rather than Hawthorne.
- c. Would be ethically permissible as long as the terms of the loan are fair and reasonable.
- d. Would raise no ethical concerns as long as the client gives informed consent.

33. Lauren represents her employer, Anointed Healthcare Ins. Co., whenever it is sued for denying medical expense claims. Kevin is one of her former law school classmates, and he has a general practice in town. For some months, Lauren and Kevin have been in a “friends with benefits”-type relationship. Kevin has been approached by Leonard Calcone, one of Anointed’s insureds who wants to sue for a denied claim. Calcone seems to have a good case. With Lauren representing the insurance company:

- a. Kevin would be precluded from representing Calcone because of his sexual relationship with Lauren.
- b. Kevin is not precluded from representing Calcone but, to be on the safe side, both clients should be informed of the lawyers’ relationship and give informed consent.
- c. As long as Lauren and Kevin are not actually married, it could raise no ethical concerns for Kevin to take on the representation of Calcone against Anointed.

d. Courts are clear that a lawyer's privacy rights trump any interest that a client might have in the lawyer's personal life.

34. Cooper and Rondino are business associates and defendants in an action for tortious interference with a business relationship. Vincent Astor represents them. As the evidence has developed, it's apparent that Cooper had the more active role in causing the alleged interference. A week before the scheduled trial, the plaintiff's lawyer called Astor and offered Rondino a deal in which Rondino would pay no damages but give testimony against Cooper. Later that day, the plaintiff moved to disqualify Astor from representing Rondino.

a. The disqualification motion would be denied because the plaintiff has waited too long to ask for it.

b. The disqualification motion would be denied because the plaintiff himself has precipitated the alleged conflict of interest.

c. The disqualification motion would be denied because Astor does not have a conflict of interest.

d. It would be proper for the court to grant the motion and disqualify Astor from representing Rondino.

35. While interviewing an applicant for a position at his firm, Padrick noticed that the applicant's resume said he'd been a law clerk for Judge Orin Howitz. Recognizing the judge as a former classmate, Padrick gave him a call. The judge said he'd never heard of the applicant, and never had him as a clerk.

a. Padrick must inform the appropriate professional authority.

b. Padrick may inform the appropriate professional authority but has no ethical obligation to do so.

c. Padrick should inform only Judge Howitz that the applicant was falsely claiming to be his clerk.

d. Padrick should not inform anyone. What a lawyer hears within the four walls of his office should remain confidential.

36. Ruth Genzer, a collections lawyer, frequently gets checks from debtors for amounts owed to her clients. She deposits the checks into a special account. Last month her pre-teen daughter incurred large physical therapy expenses that the health insurance company won't pay. Anticipating fees she'll earn in the following two months, Genzer took money from the special account as "advance fees" so she could pay some of her daughter's medical expenses. By the time the withdrawals were discovered, everything had been repaid.

a. Since everything has been repaid, Genzer should not expect any consequences from the disciplinary authorities.

b. In some states, Genzer might be disbarred for this sort of conduct.

c. Given the extenuating circumstances of the case (the urgent medical needs of Genzer's daughter), this wrong will likely be excused.

d. As long as Genzer always intended to repay the money, her actions would not be regarded as serious misconduct, under the principle "no foul, no penalty."

37. Edwin Merwahl was retained by a former high school classmate, Nora Clifton, to handle an employment dispute. They'd never been sweethearts previously, but the many hours they spent together preparing for the hearing kindled feelings in both. Today, after a long day at the office, Edwin and Nora went out for dinner. At Nora's suggestion, Edwin stopped by her place to pick up some papers. As one thing is leading to another, Edwin excuses himself so he can check out the Model Rules on his Blackberry. He will find that:

- a. There's no ethical problem in letting their passions lead where they may as long as they were already acquainted beforehand.
- b. There's no ethical problem in letting their passions lead where they may as long as no conflicts of interest arise.
- c. Edwin is getting himself into forbidden territory, and he should not engage in sexual relations with Nora until the legal representation is over.
- d. As consenting adults, Edwin and Nora may do as they please, and the disciplinary authorities have no business getting involved in a lawyer's selection of romantic partners.

38. During the course of pre-trial proceedings, Higby's lawyer communicated with the opposing client in violation of the local ethical rules (based on the Model Rules). Angered that the forbidden communications had occurred, the trial judge prevented Higby from introducing certain evidence. As a result, Higby was unable to prove his case, which cost him an almost certain judgment of several hundred thousand dollars. Higby now wants to sue his lawyer for malpractice. In the greatest number of states, the fact that the lawyer violated the ethical rules is:

- a. Evidence of negligence.
- b. Negligence per se.
- c. Totally inadmissible.
- d. The basis for a rebuttable presumption of negligence.

39. Just as he was leaving his office one evening, Durbin received a visit from a man who claimed he'd been defrauded in an elaborate hoax. Durbin listened and, in the end, told the man that he did not have a case. He said this without doing even a minimal amount of legal or factual research. The man left. Now, some time later, the man is suing Durbin for malpractice because, it turns out, he not only had a solid legal claim but, due to the delay, he'd missed a chance to attach some assets from which the judgment could be enforced:

- a. Durbin could not be liable for malpractice because he never accepted the man as a client.
- b. Durbin could not be liable for malpractice because he never accepted a fee from the man.
- c. Durbin *could* be liable for malpractice if he gave legal advice under circumstances in which a reasonable person would rely on that advice.
- d. Durbin *could* be liable for malpractice only if the man signed a retainer agreement.

40. Five years ago, Ed Kirby represented a natural gas developer. Among other things, he negotiated exploration and royalty agreements under which the developer acquired natural gas rights to dozens of farms in Shalefrack County. After watching some shows

on the Discovery Channel, however, Kirby became convinced that the developer's extraction methods are harmful to the environment. He terminated his representation of the gas developer. Now several farmers want Kirby to represent them in actions to invalidate the exploration and royalty agreements that they have signed with the developer. This representation of the farmers by Kirby:

- a. Is a legitimate use of the expertise that he has acquired in prior representations.
- b. Involves a conflict of interest for which he can be disqualified.
- c. Involves a conflict of interest that is curable with the consent of the farmers.
- d. Would not likely involve a conflict of interest if Kirby did not personally negotiate the agreements with the farmers he is now representing.

41. Corky Waters represents David Ebbs, the defendant in a personal injury action. The plaintiff is David's sister, Fiona. She was injured in a boating accident on David's boat. Corky's fee is paid by David's insurance company, which will also pay any award of damages up to \$350,000. David thinks Fiona's lawyer is a shyster who wants to take the case "all the way." David urges Fiona to call Corky and see if she can work out a deal to settle the case.

- a. It's all right for Corky to talk to Fiona about the case as long as she calls him and not the other way around.
- b. It's all right for Corky to talk to Fiona about the case as long as he first warns her that she's entitled to have her own attorney in on the call.

- c. Not only is Corky not ethically allowed to talk to Fiona about the case but David Ebbs is not allowed to either.
- d. None of the above.

42. This morning Jackson was retained by a client who was hit last night by a pizza delivery vehicle. The vehicle was driven by an employee of Plaza Pizza, a small local chain with 10 stores all around the county. Jackson's client got the name and personal cell phone number of the delivery driver. The first thing Jackson did, as a preliminary to suing Plaza Pizza, was to call the driver and get his story. Today, Jackson received an angry call from Plaza Pizza's regular counsel, who is on a continuing retainer:

- a. Jackson violated the no-contact rule if he should have inferred that Plaza Pizza probably had retained counsel based on the fact that it is a business of significant size.
- b. Jackson violated the no-contact rule by talking to an unrepresented person, *i.e.*, the delivery driver, if the driver did not have a lawyer of his own.
- c. Jackson did not violate the no-contact rule as long as he did not have positive knowledge that Plaza Pizza was already represented by counsel.
- d. Jackson did not violate the no-contact rule as long as he only talked to the driver since Plaza Pizza's lawyer presumptively does not also represent the driver, who was merely an employee.

43. In a new investigation of MacBeale Mortgage Co., the Federal prosecutor arranged to have two persons go into a MacBeale branch

and apply for mortgage refinancing. Each was to say (falsely) that he had a low-paying job as a maintenance worker. The purpose was to see if the MacBeale loan officials would falsify the paperwork by creating representations of higher-paying employment.

- a. There is a violation of the no-contact rule.
- b. There is no violation of the no-contact rule as long as the no *lawyer* in the prosecutor's office went in to talk to the MacBeale employees.
- c. There is no violation of the no-contact rule because the state ethics rules do not apply to Federal prosecutors.
- d. There is no violation of the no-contact rule because this sort of sting operations is considered a legitimate investigative technique authorized by law.

44. Shirley Raynor is suing Endicott Corp. for employment discrimination against her client. Endicott is represented by Hopps, Irwin & Buckworth. Last night Raynor found a message on her answering machine. It was from a person describing himself as a former low-level Endicott employee who has some documents that "might be very useful" in her case. Raynor is weighing whether to return the call. Her biggest concern should be that:

- a. She is not permitted to speak with the caller under the no-contact rule.
- b. She is not permitted to receive papers or other items that are the Endicott's property and have been taken without permission.

- c. The documents that the caller has may be covered by the rule of confidentiality.
- d. The caller may come to think of her as also representing the caller, and that would lead to a conflict of interest.

45. Suppose in the preceding question, the caller comes to Raynor's office, uninvited, and leaves off an envelope full of papers. When Raynor later looks at them, she realizes almost immediately that the papers are notes of conversations between Endicott's president and a lawyer from Hopps, Irwin & Buckworth. Raynor should:

- a. Remember her duty to her client and read through the papers as quickly as she can so there will be no suspicious delay in calling Hopps, Irwin & Buckworth to report that she has them.
- b. Be careful not to let anyone know that she has received the papers and, if asked, she should reply by claiming the attorney-client privilege.
- c. Promptly report receipt of the papers to Endicott via their attorneys Hopps, Irwin & Buckworth.
- d. Do whatever she wants to with the papers since, under the almost universal rule, the attorney-client privilege no longer applies after Endicott let the papers get out of their control.

46. While waiting to go into a closing of residential real estate deal, Sandlin's client told him that the sewage connection got "some kind of clog in it" and none of the sinks or toilets are draining anywhere in the house. The buyer had previously gotten an inspection report, and everything seemed all right then. Sandlin's client says he plans

not to mention the drainage problem to the buyer. Under the Model Rules, Sandlin would be required to:

- a. Say nothing about the drainage problem as long as his client does not make any misrepresentation about it or otherwise commit fraud.
- b. Say nothing about the drainage problem even if his client tells the buyer that everything with the house is still “working fine.”
- c. Disclose the drainage problem to the buyer (unless his client does so).
- d. Either disclose the drainage problem to the buyer (if his client doesn’t) or withdraw from representation.

47. Suppose that, in the preceding question, the contract required the seller to deliver to the buyer a written certificate stating that, as of the time of the closing, “the heating, plumbing, electrical and drainage systems were all in working order.” The day before the closing Sandlin had prepared a certificate for his client to sign and deliver to the buyer at the closing. After his client tells him about the problem with the drainage system, Sandlin should (under the Model Rules):

- a. Keep his mouth shut and have his client sign and deliver the certificate.
- b. Avoid doing anything that would assist his client in fraudulent conduct.
- c. Immediately report to the buyer’s lawyer what his client has told him about the drainage system.

- d. Immediately withdraw from representation.

48. During settlement negotiations in a personal injury case, the plaintiff’s lawyer asked the defense lawyer what the policy limits were on the defendant’s insurance policy. The defense lawyer answered \$100,000. On his lawyer’s advice, the plaintiff then settled for \$100,000. The plaintiff’s lawyer later learned that defense lawyer had deliberately understated the policy limit, which was in fact \$300,000.

- a. The plaintiff’s lawyer should probably just let it ride and do nothing in this situation.
- b. The defense lawyer should not be liable in this situation since no sensible person can reasonably rely on statements that a lawyer makes to an opposing lawyer.
- c. The defense lawyer should not be liable as long as the plaintiff’s lawyer had independent access to accurate information about the policy limits.
- d. There is sound authority for holding the defense lawyer liable for material misrepresentations.

49. Prestwick represented the seller in a large real estate transaction. During the negotiations, the buyer’s lawyer asked Prestwick if, in his opinion, a certain portion of the land would be legally buildable. Prestwick answered “yes” even though he was aware that, based on past perc tests, it would be difficult or impossible to obtain building permits:



- a. Prestwick cannot be held liable for misrepresentation because the question of whether land is legally buildable is essentially a matter of legal opinion.
- b. Prestwick can be held liable for misrepresentation because his stated legal opinion implies the existence of facts that he knows don't exist.
- c. Prestwick cannot be held liable for misrepresentation because, in the adversary system, lawyers have no right to rely on statements made by their opponents.
- d. Prestwick can be held liable for misrepresentation because a lawyer commits malpractice by misstating the law, even to another lawyer.

50. Dawson represents the plaintiff in a commercial dispute. When he found out his client had suffered a serious stroke, he immediately phoned the defendant's lawyer and tried to negotiate a settlement. He did not tell the other lawyer about the stroke, however, because his client would have made such a good witness on his own behalf. Losing that testimony substantially reduced the settlement value of the case. Believing the plaintiff was still well, the defendant made a very attractive offer of settlement, which Dawson snapped up

- a. Dawson probably violated his duty of candor in failing to disclose his client's illness to the opposing lawyer.
- b. Dawson has violated his duty of candor by seeking to take tactical advantage of the opposing lawyer ignorance.
- c. By not mentioning the stroke to the opposing lawyer, Dawson would be assisting his client in fraudulent conduct.

- d. Apart from discovery or special procedural rules, a lawyer is not generally required to disclose relevant information to the other side.

51. Begg's client was under contract to purchase Cornwall Works, Inc., a small manufacturer. Begg reviewed Cornwall's corporate books and gave Cornwall a clean bill of health in his written report. However, Begg negligently overlooked several serious irregularities in the records. In any case the sale fell through. Later on, another buyer became interested in Cornwall. At the second buyer's request, Begg's client sent over a copy of Begg's report. Only after the second buyer completed the purchase did it come out that Begg's report contained serious errors. Cornwall was worth only a fraction of what the second buyer paid for it.

- a. Traditionally, the rule of privity would protect Begg from liability to the second buyer.
- b. Today, Begg could be liable to the second buyer if it was reasonably foreseeable that some later buyer would rely on it.
- c. Both of the above.
- d. By putting out the erroneous report, Begg would be liable for malpractice to anybody who detrimentally relied on it.

52. Forwald represents a seller in a more or less standard residential real estate sale. The buyer does not have a lawyer. In drafting the contract of sale and structuring the deal, Forwald should:

- a. Behave toward the buyer exactly as he would if the buyer had a lawyer.

- b. Seek the trust of the buyer by assuring him that he is looking out for both parties.
- c. Give legal advice to the buyer to the extent reasonably necessary to assure that the buyer is advised of his rights and does not miss any important opportunities.
- d. Explain the material terms of the transaction so the buyer understands their actual effect, but make clear that he is not representing the buyer's interests.

53. Gary's trial was going swimmingly when, all of a sudden, his client told a flat-out lie during cross-examination. Specifically, the client said something that was the exact opposite of what he'd been telling Gary from the very first day he came into the office and retained him.

- a. Gary must try to get his client to retract the perjury.
- b. If Gary can't get his client to retract the perjury, he must withdraw from representation under Rule 3.3.
- c. Both of the above.
- d. Gary doesn't need to say anything about the perjury if doing so would disclose confidential information, but he may not allude to it or rely on it in making his closing argument.
- e. The first thing Gary should do is to inform the court about the perjury.

54. Carl Pressler represents one of the two defendants in a personal injury action. While the plaintiff's lawyer's was conducting direct examination of a witness, Carl heard the witness say something that did not jibe at all with Carl's understanding of the facts. The statement was, however, favorable to Carl's client and tended to focus blame on the co-defendant (who was not Carl's client). Carl wonders whether the witness was deliberately lying or just made a mistake.

- a. Carl has an ethical duty to report the false statement if he can do so without disclosing confidential information.
- b. Carl has an ethical duty to report the false statement whether or not doing so would disclose confidential information.
- c. Carl has no duty to report the false statement because he does not know it was perjury.
- d. Carl has no duty to report the false statement because a lawyer is not required to reveal relevant information to the other side.

55. Rose McGuthrie represents Skeeter, who is accused of stealing a GPS from a parked car. Skeeter confessed to the theft during police interrogation, but now he denies that he did it. Rose doesn't particularly believe his denials, but her bigger concern is that Skeeter wants her to put two buddies on the stand to say he was with them at 9:07 p.m. which, according to the time stamp on the parking-garage video, was the time that the theft occurred. The blurry video doesn't permit identification of the thief and, in addition, Rose thinks the time stamp is wrong since it looks like there was daylight outside when the thief appears in the video.

- a. Under no circumstances can Rose ethically call the alibi witnesses to testify.
- b. There is some respectable authority indicating that, to properly represent her client, Rose should call the alibi witnesses to testify.
- c. According to usual the allocation of authority between lawyer and client, the decision to call a witness is for the client to make, not the lawyer.
- d. Rose may call the alibi witnesses to testify only if she can resolve her doubt about her client's credibility.

56. Smett is a businessman that Jordan represents on retainer. He just called up with a problem. He said he bought a second-hand laptop and found explicit photos of underage persons on the hard drive. When Jordan told him to turn the laptop over to the police, Smett replied: "But I need that computer in my business. It's got all my files, contacts, emails and data on it. I'd lose several days getting another replacement up and running, and I just can't afford it. I'm going to just delete the photos instead" Before Jordan could respond, Smett hung up. If Jordan is later called to testify about this conversation:

- a. It would be protected in its entirety by the attorney-client privilege.
- b. The part about the intention to delete the illegal photos would not be protected by the attorney client-privilege.
- c. The part about the intention to delete the illegal photos would be particularly strongly protected by the attorney client-privilege.

- d. None of the conversation would be protected by the attorney-client privilege.

57. Marie Graham collided with another car. At the time, her husband was in the front passenger seat and her teenage son and a neighbor boy were in the back. You are her lawyer. During your intake interview, Marie stoutly maintained that the traffic light was green in her direction. However, her husband disagrees and concedes (reluctantly) that the light was red. Her son and the neighbor boy are less certain, but they "think" it was red also. Which of the following persons can you ethically ask to refrain from talking to the other side?

- a. All of the passengers.
- b. Marie's husband only.
- c. Marie's husband and son only.
- d. None of the passengers.

58. Lloyd Beecham represents is an elderly woman, Lidia Juarez, who was run down by an inebriated teenager. The teenager is represented by Wendy Schneider, a recent law school graduate. Her firm was hired by the teenager's insurance company. Beecham thinks Ms. Juarez will be a highly sympathetic witness on her own behalf, but he fears that she might easily be intimidated and confused. At a deposition, Ms. Schneider astutely begins trying to discombobulate Ms. Juarez in an (understandable) effort to undermine her credibility. Beecham interjects a number of crude references to Ms. Schneider's gender and anatomy in an effort to throw her off balance and, hopefully, preserve his client's credibility.

- a. Beecham's strategy, though a bit edgy, is acceptable practice when necessary to assure that justice will prevail.
- b. Beecham's strategy is well within the bounds of proper advocacy.
- c. Beecham's strategy is reprehensible because, among other things, it is at odds with the need to preserve public confidence in the administration of justice and in the impartiality of the legal system.
- d. Beecham's strategy is reprehensible because a lawyer should never employ tactics calculated to throw the adversary off balance.

59. In an action for fraud and misrepresentation, one of the issues was when your client, Prufrock, first had knowledge of certain crucial information. At a deposition he was asked about an email describing defective valves. He's told you privately that he remembers receiving and reading the email in question on March 6, 2009. The question at the deposition was: "Did you receive and read an email concerning defective valves on March 6, 2009?" Which of the following alternative answers could Prufrock give *without* committing perjury?

- a. No.
- b. I don't remember.
- c. It could have gone in my spam folder.
- d. None of the above answers could have been given without committing perjury.

60. Prufrock's company did business with a distributor based in North Castle, New York. A critical element of the opponent's case turns on whether Prufrock was involved in certain meetings that allegedly occurred at the distributor's offices. He was asked under oath, "Did you attend any meetings at [the distributor's] office in New Castle during the month of March, 2009?" The correct answer is that he attended one meeting in *North* Castle on March 12. Up to this point, nothing in the case had any connection with New Castle, and the distributor did not have an office there. If Prufrock answers "no":

- a. It is clear from the cases that he could not be convicted of perjury.
- b. His answer might be considered perjurious because it appeared on its face to be fully responsive and it was entirely reasonable to expect Prufrock to understand that the questioner meant *North* Castle.
- c. His answer might be considered perjurious because people are generally expected at their peril to comprehend what information questioners are seeking and to answer questions accordingly.
- d. He would surely be safe from a perjury conviction because the question used the word "meetings" (plural) and Prufrock had attended only *one* meeting in March.

61. On the way to the airport in April 2009, Prufrock stopped at the distributor's offices to drop off some papers. He had a brief unscheduled meeting with two of the distributor's representatives. During a later deposition, he was asked under oath, "Did you attend one or more meetings at [the distributor's] office during the month of April, 2009?" He answered "no." Prufrock later realized his mistake

and told his lawyer. Under the Model Rules, the lawyer must take reasonable measures to remedy this misstatement:

- a. Even if Prufrock was making an honest mistake and had temporarily forgotten about the brief April meeting.
- b. Only if Prufrock was making an intentionally false statement in saying “no.”
- c. Only if Prufrock’s answer constituted “criminal or fraudulent conduct related to the proceeding.”
- d. Only if Prufrock, after consultation, gives informed consent to such a disclosure.

62. Glenn Graves is on trial for assaulting his wife. The prosecution has called his wife’s sister, Frieda Riesman, who says she witnessed the assault. Graves’ lawyer believes that Mrs. Riesman’s testimony is true. However, the lawyer’s investigator has discovered that Mrs. Riesman was convicted of lying on a loan application six years earlier. On cross-examination, Graves’ lawyer would:

- a. Not be ethically permitted to ask about the prior conviction.
- b. Not be ethically permitted to ask about the conviction in this instance because it would cause great personal embarrassment to Mrs. Riesman.
- c. Not be ethically permitted to ask about the conviction in this instance because it would undermine Mrs. Riesman’s credibility.

d. Arguably be ethically *required* to ask about the conviction if he thought that doing so would be a strategically effective way to hurt Mrs. Riesman’s credibility.

63. Ricky Marr was arrested as he was taking a shortcut across a downtown parking lot. Moments before his arrest, five other teens, slightly older than Ricky, ran into the lot chased by police. Ricky was the only one caught. Although he had no drugs on him, he was accused of participating, with the other teens (still at large), in an aborted drug sale just around the corner. Ricky denies involvement, and there’s evidence he was coming from a deli located in the exact opposite direction from the scene of the aborted drug sale. One of the police officers says he saw Ricky at the drug sale.

- a. The prosecutor ethically should argue for an inference that Ricky participated in the drug sale even if she personally believes he wasn’t involved.
- b. The prosecutor should not let her personal beliefs get in the way and she ethically must argue that Ricky was involved in the drug sale as long as she has probable cause.
- c. Ricky’s defense lawyer should argue for an inference that Ricky did not participate in the drug sale even if he personally believes that Ricky was involved.
- d. Ricky’s defense lawyer should *not* argue for an inference that Ricky was at the deli if he personally believes that Ricky was actually participating in the drug sale.

64. Trescott represents an amusement park being sued by an 8-year-old child who was injured on a ride. The park owner tells Trescott that he’d been having trouble with the ride. Even though he knew it

was dangerous, he decided for financial reasons to go ahead and run the risk of operating it. He adds that the only other people who know about this deliberate risk-taking are two summer employees from Belgium who are now both back in Europe. Trescott decides that the plaintiff's injuries were caused by the park owner's negligence, but that the plaintiff probably can't prove it.

- a. It would violate the Model Rules for Trescott to put up a defense in this situation.
- b. Most lawyers in Trescott's position would conclude that his client has a meritorious defense as long as the plaintiff probably can't prove the facts necessary to win.
- c. Most lawyers would agree that Trescott should advise his client to admit the negligence and focus on minimizing the damages.
- d. Most lawyers would agree that Trescott cannot ethically take this case if the defendant is seeking only to deny justice to the plaintiff.

65. Another client of Trescott's is being sued by a landscaper who was injured by an unsafe condition on the client's premises. The plaintiff is applying for refugee status, which will allow him to stay in the country, but Trescott thinks it unlikely that the application will be granted. Meanwhile, Trescott is considering various legal tactics that will delay the progress of the lawsuit. His hope is that the plaintiff will be deported before trial, which will effectively lead to a discontinuance.

- a. Trescott should not adopt delaying tactics because he is ethically required to make reasonable efforts to expedite the litigation.

- b. The rules say Trescott is ethically required to expedite the litigation only when doing so is consistent with the interests of his client.
- c. Trescott should not adopt delaying tactics because the rules prohibit delay unless it is consistent with the *legitimate* interests of the client.
- d. Trescott should adopt delaying tactics because his only concern should be with his client and not with the adversary.

**<End of examination>**