

PACE UNIVERSITY SCHOOL OF LAW

PROFESSIONAL RESPONSIBILITY
PROFESSOR HUMBACH
FINAL EXAMINATION

December 17, 2008
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.

This is a **closed book** examination.

GENERAL INSTRUCTIONS:

This examination consists of 15 multiple choice questions and 11 short-answer essay questions based on 2 fact situations. If you are not using the SecureExam system, answer the questions in the spaces indicated (and use the multiple choice answer sheet). **If you use the SecureExam system**, answer *all* questions, including multiple choice, in your SecureExam submission, making sure you *clearly number* all answers and put multiple-choice answers *at the beginning*.

There is no official space limit, and you may continue answers on the back of the page (**clearly numbered**). However if you exceed the allotted space (about 9 or 10 lines for Secure Exam) you are probably including irrelevant information and losing time.

Each short-answer essay question will have roughly equal weight. The multiple choice questions *as a group* will weigh about the same as 3 short-answer essays. You will be graded more on the quality of the explanations that you give for your suggested resolutions than on how you think the issues would be resolved. If you think there is a strong argument or consideration weighing *against* the position you take, state it. Remember to keep your reasons **on point**. Do not circle around your point. Aim for the bull's eye. A significant portion of a lawyer's skill, and your grade, depends on the ability to discern the relevant from the non-relevant.

Important note: If you are using SecureExam and *any part* of your answers is written in a Bluebook or otherwise has been placed in the large brown envelope collected by the proctors, *be sure to write "contains answers" conspicuously on the front of the envelope and make sure the answer material is conspicuously placed in the envelope*. Failure to do so may mean that material in the brown envelope will not be graded.

1. An “integrated” bar means one that:
 - a. Specializes in admitting members of all different races.
 - b. Combines a CLE provider and ethics enforcer into a single entity.
 - c. Has mandatory membership, with mandatory dues, for all who practice law in the state.
 - d. Includes both lawyers and paralegals as co-equals.

2. The “inherent powers” of the courts with respect to the legal profession:
 - a. Mean that courts can strike down legislation affecting who is eligible to practice law or otherwise purporting to regulate the legal profession.
 - b. Are the source of the authority for courts to decide lawsuits in common-law cases.
 - c. Are the source of the authority for courts to decide lawsuits requiring the interpretation of statutes.
 - d. Have generally been done away with under modern theories of professional regulation.

3. The Model Rules of Professional Conduct:
 - a. Are the first set of standards governing the profession that was published by the American Bar Association.
 - b. Were drafted to replace the Model Code of Professional Responsibility.
 - c. Were replaced by the Model Code of Professional Responsibility.
 - d. Were drafted by the American Bar Association and, therefore, are legally binding on American lawyers.

4. The basic difference between discipline and malpractice as remedies for professional misconduct or failure is:
 - a. Discipline is concerned primarily with protection of the public as a whole, while malpractice is primarily concerned with compensating persons who have been harmed.

- b. Malpractice is concerned primarily with the protection of the public as a whole, while discipline is primarily concerned with compensating persons who have been harmed.
 - c. Discipline generally takes the form of a private tort actions against lawyers who allegedly have transgressed the rules.
 - d. Malpractice actions are generally founded on violations of the Model Rules, whereas discipline can also be based on more general ethical considerations.
5. Requirements of due process applicable to discipline mean that an accused lawyer is entitled to several things. Which of the following is *not* included among them?
- a. Notice of the charges.
 - b. A specific description, in advance, of the precise unprofessional conduct that the lawyer is accused of committing.
 - c. A hearing in which to answer the charges.
 - d. An opportunity to be heard.
6. Larry Rayburne recently graduated from law school and has just passed the bar. He has been asked by a friend to draft a will, an area in which he has no experience. Is Larry allowed under the Model Rules to accept this assignment?
- a. No. In light of the duty of competence, he would not be qualified to take on this representation.
 - b. Yes. A newly admitted lawyer can be as competent a a practitioner with long experience.
 - c. No, because he needs special training, which he does not yet have.
 - d. Yes, but only if this can be construed to be an “emergency” situation.
7. Karper was arrested at a traffic stop for possession of a controlled substance. During the preliminary proceedings, his court-appointed lawyer did not move to suppress certain evidence that was discovered as a result of a violation by the police of Karper’s constitutional rights. At trial Karper was convicted based primarily on this evidence, and he was sentenced to 15 years. On appeal:

- a. Karper would prevail because his lawyer made a huge blunder for which Karper himself, as mere client, cannot be held responsible.
 - b. Karper would prevail because a constitutional right is not something that a person can “waive” without a conscious choice to do so or, at least, informed consent.
 - c. Karper would lose because, with few exceptions, a client is bound by the choices made by his or her lawyer.
 - d. Karper would lose because a lawyer can almost never be held liable for malpractice in a criminal defense.
8. In a lawsuit against Lando, Arthur Revett told his lawyer, Mennich, that he’d settle for any amount over \$500,000 “but not a dime less.” Mennich later received a settlement offer of \$495,000, described as a “final offer,” from Lando’s lawyer. In the exercise of his professional judgment and in light of the evidence, some of which was weak, Mennich accepted the offer.
- a. The acceptance should be binding because, as attorney, Mennich had general authority to settle the case.
 - b. The settlement might be binding even if Mennich did not have actual authority to settle the case at \$495,000.
 - c. If Mennich had apparent authority to settle at \$495,000, then the settlement would be binding and Revett would have no further recourse.
 - d. In general as between lawyer and client, the client decides the objectives of representation and it’s up to the lawyer to decide the means (*i.e.*, whether and for what amount to settle).
9. Talbert represented Harrigan in a drug case, obtaining a plea deal that got Harrigan out after only a few months. A couple of years later, Talbert himself was arrested for possession of cocaine and he agreed, in exchange for a recommendation for reduced sentence, to attempt to buy drugs from Harrigan while wearing a recording device.
- a. As long as Talbert was no longer acting as Harrigan’s attorney, this course of conduct should raise no problems.
 - b. Even though the representation may have ended, these facts raise serious questions whether Harrigan has violated his duty of loyalty and the trust owed by lawyers to people they represent.

- c. As long as Talbert was working for the police, his conduct could not constitute a breach of his ethical responsibilities.
 - d. As long as Talbert didn't cause Harrigan to do things he would not otherwise do, his conduct could not constitute a breach of his ethical responsibilities.
10. Gary Edmunds was sitting in his office when a woman walked in with a package of papers and said "I think you ought to see these." They turned out to be confidential reports of prototype tests by Archevecchio Company, which he was in the midst of suing for products liability. He suspects the papers contain some powerful evidence that would help his case. The woman says that, until last week, she used to work for Archevecchio Company. Under the Model Rules:
- a. Gary cannot ethically talk to her at all, at least not about the case.
 - b. Gary can talk to her about the case, but only if counsel for the company is present.
 - c. Gary would be ethically permitted to talk with her about the case.
 - d. Gary can have no ethical obligation to talk to her or look at the papers.
11. As for the papers in the preceding question,
- a. Gary may take them and look at them unless doing so would violate the legal rights of the company.
 - b. Gary may definitely read them, but he may not take them into his possession.
 - c. Gary would be obligated to take affirmative steps to acquire possession of the papers and then return them promptly (unread) to the company.
 - d. In our adversary system, Gary would owe no duty whatsoever to the opponent to do or refrain from doing anything he sees fit with respect to the papers.
12. When a defendant in a criminal case is represented by counsel, the prosecutor:
- a. May not ethically communicate with the defendant, except in the presence of his/her counsel, either directly or through intermediaries (such as police, investigators or informants).
 - b. May generally use intermediaries to communicate with the defendant indirectly (such as police, investigators or informants), but may never do so directly.

- c. Generally has a free hand to communicate with a represented defendant throughout the criminal process.
 - d. May communicate with the defendant as authorized by law and is particularly free to do so before the defendant has been indicted or is in custody.
13. Lia Karmen was just retained by Reynard in a matrimonial dispute. Reynard says his wife told him she was getting a divorce and threw him out of the house, saying he'd "get the legal papers any minute now." One of Reynard's main concerns seems to be his stamp collection, which is still back at the house. He asks Karmen if she would call his wife and arrange for him to get the collection. He tells Karmen that he does not know whether his wife has a lawyer yet.
- a. Karmen should probably assume that Mrs. Reynard has a lawyer and, if so, any communication she has with Mrs. Reynard should be limited to finding out who that lawyer is.
 - b. Karmen does not, on these facts, have to assume there is any ethical limitation on her communications with Mrs. Reynard.
 - c. Until Karmen positively knows, with a firm factual basis, that Mrs. Reynard has a lawyer, Karmen can ethically assume that she does not.
 - d. Because she is representing Mrs. Reynard's husband, Karmen is free to speak with Mrs. Reynard about the matrimonial dispute.
14. Once Karmen finds out that Mrs. Reynard has a lawyer,
- a. She cannot communicate directly with Mrs. Reynard concerning any subject whatsoever.
 - b. She may ethically advise Reynard concerning communications with Mrs. Reynard, but she may not go so far as to use Reynard to get around the rule about communications with represented parties.
 - c. Neither she nor Reynard can communicate with Mrs. Reynard concerning the subject of the representation.
 - d. Reynard can communicate with Mrs. Reynard concerning the subject of the representation, but Karmen and Reynard are not permitted to discuss any such communications.

15. Emma Jackson retained Warbler in the sale of her house. She specified among other things “In no circumstances do I want to take back a second mortgage.” However, in the negotiations it became apparent to Warbler that he could get Jackson \$25,000 more for the house if she took back a second mortgage for \$20,000. He negotiated the deal on this basis, including a second mortgage. Warbler’s conduct:
- a. Would be generally be regarded as commendable initiative, getting a better deal for his client that she would have gotten on her own.
 - b. Would mean that the deal for the second mortgage is not binding on Jackson.
 - c. Would constitute malpractice, for which Warbler can be held liable if loss ensued.
 - d. Would constitute ineffective assistance of counsel for which Warbler may well be disbarred.

I.

Burt Irwin graduated from law school about 5 years ago, has a mortgage, supports a family and works as a regulatory lawyer in the general counsel’s office of Wilbrave Pharmaceutical Co., which makes an anti-nausea medication known as Perdibras. While Perdibras is very effective if used as intended, it can have disastrous consequences if administered by a method of injection called “IV push.” Even though IV push is the fastest way to bring relief to nauseated patients, it carries with it a substantial risk of gangrene, which can require amputation of the affected limb. There is a safe and effective (albeit slower) way to administer Perdibras and, on this basis, the FDA has approved it.

The drug comes with a warning label stating that intramuscular injection is the preferred mode of use and mentions that gangrene can result if the drug is injected into an artery. After several amputations were reported to the company, consideration was given to a stronger warning label, warning specifically against the use of IV push. Changing the label would, however, require a further FDA approval and then there’d be the question, what does the company while awaiting re-approval? The general counsel and sales people agree it is better to take the position that the current warnings are adequate and sell the drug with the current labeling. Applying to the FDA would, in effect, “admit” that the current warning is too weak. That could mean recalling the drug and keeping it off the market, perhaps until the labeling issue is resolved. Anyway, the general counsel remarks, we’re probably immune from lawsuits for “failure to warn” as long as our existing label has FDA approval.

Burt is flabbergasted to hear this conclusion. “You mean we’re going to send out time bombs here just to avoid regulatory expense and, perhaps, some loss of sales? We’re talking about warnings that could prevent needless risk of amputations.” But the general counsel pointed out that everything the company was doing is “legal,” and that avoiding expenses and lost sales is the way the company makes its profits and pays its employees.

II.

After several years of practice, Henderson set out on his own. He let it be known among local attorneys that he would be interested in helping out others in temporary overload situations by taking on referrals, handling court appearances, doing depositions, etc. Last week he received a call from Roy Dormond, a successful criminal defense attorney who has handled a number of high-profile cases in recent years.

Dormond told Henderson that there was a man by the name of Hector Gracie down at the jail. He'd been picked up (with two other individuals) at an informal airfield on a farm about 25 miles from town. He was there with his truck and says he was supposed to pick a load that was coming in by air—he didn't know from where. Dormond adds that one of his own clients is "concerned" about the matter. He wants Henderson to go down to the jail and talk to Gracie, appear at his arraignment and try to get a low bail. However, under no circumstances, Dormond firmly states, is Gracie to be allowed to plead guilty. He mentions a whopping retainer.

Henderson goes down to see Gracie. He says a guy known only as "Hebby" hired him to take his truck (usually used in his one-man lawn care business) to make the airfield pick-up. The promised payment for the 2-hour job was \$2500. Gracie says he doesn't know why he's been arrested and says doesn't know what was supposed to be on the plane. All he has, he says, is a tiny slip of paper with a delivery address and phone number on it. He received the paper from Hebby, he says, and he somehow managed to keep from the police. He hands the paper to Henderson, who keeps it. Within the hour, Henderson appears at Gracie's arraignment as the attorney for Gracie. Bail is set at \$50,000 (which, of course, Gracie does not have).

Just before the arraignment Henderson found out that Gracie was charged with conspiracy to transport a controlled substance, and that the plane (intercepted when it entered US airspace) was carrying over 1000 pounds of marijuana. Henderson realizes that the delivery address, in an industrial/warehouse part of town, is probably a place

brimming with evidence of illegal drug activity—and that the phone number may well be compromising as well. He tends to believe that Gracie was an innocent dupe and did not have actual knowledge of what was going on. On the other hand, the circumstantial evidence looks bad, even without the little slip of paper.

Awaiting the trial, Henderson received a call from the prosecutor offering Gracie a deal: “time served plus two years’ probation” if Gracie will sign a sworn statement and, then, give testimony directly implicating the other two guys who were arrested with him at the airfield. The prosecutor’s plan is apparently then to put the squeeze on the other two guys so they will implicate the actual kingpin of the operation.

Henderson sees at least two problems with the prosecutor’s proposal. First, his instructions from Dormond are that Gracie is under no circumstances to plead guilty (probably to head off a deal exactly like the one proposed). The other problem is that, from what Gracie says, Henderson suspects Gracie doesn’t really *have* any incriminating information on the two other guys, so he’d be tempted to make something up just to save his own skin. When Henderson tells the prosecutor “No deal,” the prosecutor replies: “You mean you’re not even going to relay the offer to your client? It’s very generous.”

7. Since Henderson holds himself out as the attorney for Gracie, is it permissible for him to take a fee from Dormond (or, perhaps, somebody who has retained Dormond)? If he does take the fee from Dormond, is it legitimate to let Dormond call the shots on key issues like the guilty plea?

8. Suppose Gracie tells Henderson to tell the prosecutor he’ll sign the sworn statement prepared by the prosecutor (which the prosecutor can then use in his squeeze on the other two). But Gracie insists he won’t testify against the other two at trial or plead guilty himself. He wants a flat-out dismissal. Can Henderson properly decide not to convey this

counteroffer back to the prosecutor on the ground that (1) it's a strategically bad idea, or (2) he's afraid Gracie might be planning to make something up?

9. During preparation for trial, Gracie has an idea. "If I get on the stand and they ask me if anybody told me the address where the stuff was going to be delivered, can I say no? Because nobody actually 'told' me, they just handed me that slip of paper. And if they ask me if I *knew* where it was to go, I'll just say: 'Nobody ever told me'. Can Henderson keep Gracie from taking the stand? Can he advise Gracie how best to implement his idea? Would carrying out the idea be perjury?"

10. Did Henderson have any obligation to turn the little slip of paper over to the prosecution right away, or was it all right for him to keep it? How about now: Could he

refuse to produce it (if subpoenaed) on the ground that it is protected by the attorney-client privilege? Could he destroy it, or put it in an envelope and mail it to a made-up address in Ulan Bator (a city in central Asia)?

11. Suppose the prosecutor is told by one of the two other guys that Gracie is just a “mule” and was hired out of the lawn care ads in the Pennysaver, but the prosecutor doesn’t believe this. Can the prosecutor still go ahead and argue that “all” of the circumstantial evidence points to Gracie as a co-conspirator and “there’s no evidence in the case” to the contrary? Can Henderson argue to the jury (notwithstanding the little piece of paper) that “there’s not one single bit of physical evidence tying Gracie to illegal drugs”?

<End of examination.>

**Professional Responsibility
Fall, 2008
Professor Humbach**

Multiple-choice answer sheet for those *not* using SecureExam
If you are using SecureExam, *do not* use this answer sheet. Put your multiple-choice answers, *clearly numbered*, at the *beginning* of your SecureExam submission.

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(Please tear this sheet out and insert it in your Bluebooks in the brown envelope.)