

PACE UNIVERSITY SCHOOL OF LAW

PROFESSIONAL RESPONSIBILITY
PROFESSOR HUMBACH
FINAL EXAMINATION

May 18, 2007
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 presents of 5 fact situations with a total of 20 short-answer questions. Answer the short-answer questions in the spaces indicated (unless you are using the SecureExam laptop system). 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 7 or 8 lines for Secure Exam) you are probably including irrelevant information and losing time. A significant portion of a lawyer's skill, and your grade, depends on the ability to discern the relevant from the non-relevant.

Each short-answer question will have roughly equal weight. 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. *You have about 9 minutes per short-answer question.*

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 be not be graded.

I.

Emily Forrest got a job after law school with the legal department of a large drug company, PharmaGrande, Inc. One of the company's most profitable products is Skinclear, a patented medication that is unusually effective against acne. Unfortunately, studies show that Skinclear can also cause serious birth defects if used during pregnancy. PharmaGrande's legal department has been trying to persuade the Food and Drug Administration (FDA) not to ban Skinclear outright. The basic argument is that the drug's negative side effects can be avoided by taking steps to make sure that pregnant women do not use it.

A program was developed to notify dermatologists of the drug's side effects, to require them to "register" and keep lists of eligible and ineligible patients and, also, to warn pharmacists to be on the lookout for situations that might still slip by. Even with these measures in place, however, PharmaGrande has received reports from physicians indicating that last year alone as many as 100 to 200 birth defects occurred in situations where women had used Skinclear during the first 2-3 weeks of pregnancy. The main problem seems to be that Skinclear is so especially effective that patients are insistent and dermatologists sometimes find it awkward to probe patients, especially unmarried teens, about the possibility of their being pregnant after the patient says there's none. And so, in a small percentage of cases, the drug ends up being inappropriately prescribed and used.

The physicians' reports of continuing birth defects did not, of course, constitute systematic "proof" of a connection between Skinclear and the infant abnormalities. Only systematic testing could show actual cause and effect. But the physicians' reports were nevertheless alarming, and they could have a devastating impact in financial markets if they got out. PharmaGrande's senior management was also concerned about the effect they might have at the FDA. The possibilities included an immediate halt, at least temporarily, on further Skinclear sales. PharmaGrande had an obviously strong interest in not seeing this happen.

Emily first learned about the Skinclear situation when her boss (the PharmaGrande general counsel) asked her to prepare wording to be used in a periodic report to the FDA. Senior management had instructed the legal department to use every lawful means at the company's disposal to keep this highly profitable product on the market. Emily's boss wanted a report (to be signed by one of the vice-presidents) that would assure the FDA that continued availability of Skinclear on the market was not leading to birth defects. When Emily pointed out that the company's measures to date ("registration" and warning) had not fully worked to prevent use of Skinclear by pregnant women, her boss replied: "Of course not, Emily. Nothing in this world is perfect. But with the steps we've taken, we've done everything reasonably possible to ensure that our product won't be applied in high-risk situations. If improper use occurs despite our efforts, it's due to the actions of people outside the company and beyond our control. Just prepare the wording for the FDA and leave the business decisions to management."

Emily worried over this for several days. She asked her boss if she could discuss her concerns with somebody higher up in the company. He said no. She drafted the wording, but on the same day she turned it in to her boss she also mailed a letter to the FDA concerning the 100-200 reported birth defects. The following Thursday the FDA ordered a stop to all sales of

Skinclear. When Emily got to work the next morning the key to her office did not fit in the lock. As she was still fiddling with the door, two company security officials came up behind her, handed her a notice of termination and ushered her out of the building. They informed her that her personal things would be delivered to her home just as soon as company personnel had a chance to go through them and remove anything “confidential.”

1. Emily’s draft wording for the report to the FDA mentioned the reports from physicians dismissively, calling them “anecdotal feedback,” and she went on at length to describe and stress the existence of the company’s “comprehensive program of registration and warning.” She ended with the statement: “There is no basis to conclude at this time that Skinclear is causing birth defects.” Was this last statement false or merely misleading (or is there a difference)?

2. If wording prepared by Emily for the FDA periodic report was false, would Emily be subject to liability or discipline for preparing such wording at the client’s request (for signature and delivery by the client’s vice president)?

5. Does Emily have a cause of action against the company for retaliatory discharge and, if so, would she be permitted to use confidential information in order to establish her claim?

II.

Back in the late '90s Aronson was experiencing some financial difficulties with his business and his regular lawyer at the time, Perment, agreed to lend him \$100,000. At Aronson's suggestion, Perment took a second mortgage on Aronson's house as collateral for the loan. Perment prepared all the papers (at Aronson's request, to "save money"), but Perment made it clear from the outset that he was not acting as Aronson's lawyer for purposes of this particular deal. Aronson made payments on the loan and he now says that it was paid in full. However, no "satisfaction" from Perment was ever recorded and, therefore, it looks from the record like nearly \$40,000 of the loan remains unpaid.

Two years ago, just before the statute of limitations ran out, Perment's court-appointed legal representative (Perment now being a late-stage Alzheimer's patient) retained Correlli to sue Aronson for the \$40,000 that was apparently still outstanding. Correlli drafted a complaint and had it properly served on Aronson a few days before the statute of limitations ran out. However, due to an oversight Correlli did not see to it that the summons and complaint were filed with the court within 120 days after being served on Aronson, as the local rules of civil procedure require.

Last month Aronson made a motion to dismiss the case, effectively with prejudice (since the statute of limitations had now long run out). Perment has a new lawyer, Nubbins, and he is vigorously resisting the motion on the grounds that: (a) a client should not be made to suffer due

9. Is there any basis for concluding that Correlli has violated the Model Rules? Is it likely he would be disciplined?

III.

Healthy Treats Fruit Co. imports tropical produce and distributes it through various supermarket chains across the United States. It buys fruit on the market in various tropical African and Latin American countries, and it also maintains its own huge plantations in several countries. Some of its plantations are in geographically remote mountainous regions of South America, including in areas that have had significant guerrilla and drug-related violence over the past several decades. A well-known fundraising technique used by both the guerrillas and the drug gangs is to demand money from persons who live and do business in areas where they exert de facto control. These demands sometimes occur at gunpoint but more frequently the guns are kept in the background. For obvious reasons, both the payors and payees prefer that these transactions not receive publicity.

It has long been suspected that at least two local plantations have been making payments to a certain leftist guerilla group. Despite the highly unsettled and lawless situation that generally prevails in the areas where these two plantations are located, the company has been able to move products safely to market, to avoid death threats and other harassment of workers, and to operate without major disruptions. Unfortunately, however, the guerrilla group in question happens to be on the U.S. list of terrorist organizations. A rival fruit company has advertised that “unlike some of its competitors,” it can assure consumers that none of their dollars will go to the pockets of terrorists. This unwelcome spotlight has raised fears that Healthy Treats may be prosecuted under a federal law that makes it a crime to provide “material support” to terrorists.

The senior management of Healthy Treats called the suspected plantation superintendents back to the head office for consultations. When the superintendents arrived in the U.S., two lawyers from the company’s legal department, Smith and Biff, met them at the airport. Pursuant to a strategy developed by the company’s general counsel, careful efforts were made to assure that nobody in the company other than the two lawyers spoke with the superintendents on matters of substance. In their initial interviews with the superintendents, Smith and Biff specifically pointed out that “this is an obviously sensitive situation so don’t talk to anybody about it. Absolutely *nobody*.” Except of course Smith and Biff. The two lawyers added, moreover, that “everything you tell *us* will be strictly confidential and protected by the attorney-client privilege, so you can talk freely because none what you say to us can be disclosed (unless the privilege is waived). But if you talk to anybody else, they could testify against you.” During lengthy talks with the two superintendents (the “pre-indictment discussions”), Smith and Biff learned essentially the whole story about the numerous payments that had been made to the guerrillas.

Before the two superintendents could return to the plantations, the U.S. Attorney indicted them under the federal “material support” statute. It was believed by all concerned that this was just a prelude and that the company also would be indicted in the near future. The same morning they learned of their indictment, the two superintendents each got a lawyer of his own, at his own expense. Later in the day, Smith and Biff visited the superintendents at the hotel where they were staying and had a little chat (the “post-indictment discussion”). The two lawyers assured the superintendents they’d done the right thing to retain their own counsel, but they should know also that they had “the full support of the company as long as they did their part by avoiding any embarrassing disclosures, which could only make things worse.” Specifically, Smith and Biff

strongly reiterated their request that the superintendents not talk about the case to anyone else apart from their own and the company’s lawyers, and most particularly not to anybody at the U.S. Attorney’s office, except of course as required by law (subpoena).

10. Can the government force Smith and Biff to testify as to what they learned from the superintendents during the pre-indictment discussions?

11. Suppose the government offers the company a very favorable plea deal on the condition that the company disclose all information that it has concerning the payments. Can the superintendents invoke the attorney-client privilege to prevent Smith and Biff from revealing what was said during the pre-indictment discussions? What if Smith and Biff testify over the superintendent’s objection and reveal evidence inculcating the superintendents?

12. Is there any ethical issue raised by the post-indictment discussion between Smith, Biff and the two superintendents?

13. Assuming there was no violation of a witness-tampering statute or the like, was there any problem with request by Smith and Biff that the superintendents not voluntarily speak about the case with other persons, including the government? Would the Model Rules permit the U.S. Attorney to talk with the superintendents without permission of the company counsel anyway? Would it matter if any such requests were reiterated after the superintendents' employment had been terminated, either by them or by the company?

IV.

Bobby Bramston was asked by a local judge to represent a man who had been arrested in a stalking case. A short time later, Bramston met his new client, Jocko, at the county jail. As they discussed the case, it became obvious to Bramston that the relationship between Jocko and the alleged victim (Jocko's ex-girlfriend, Doris) had gone very sour. Although Jocko denies that he stalked Doris, he admits a deep dislike for her and, among other things, hopes that Bramston will be able to essentially destroy her reputation at during cross-examination at trial—if it comes to that. Jocko says he has a number of very “juicy” tidbits about her past that could be used to devastate her credibility.

“I also need a small favor,” Jocko said to Bramston as the interview was coming to a close. “I owe some money and these guys don't like excuses. If you get my clothes and stuff that they took when I came in here, you'll find my wallet. It's got a bank safe deposit key where I've got a bunch of cash and also the telephone number of the guy I've gotta pay.” Reluctantly Bramston agreed and, on his way out of the jail, he picked up a small bag from the clerk. The bag contained Jocko's street clothes and sneakers, his wallet and other personal effects he had at the time of his arrest. Later that day, Bramston discovered that Jocko's safe deposit box contained over \$20000. He called the telephone number and met the guy that Jocko owed, paying the amount that Jocko had mentioned.

The next time Bramston went to see Jocko at the jail, he asked Jocko what he wanted done with the rest of the stuff in the bag. Jocko told him to keep the wallet and its contents but to just throw everything else away, since it was “junk.” This suggestion struck Bramston as unusual, but when he got back to his office parking lot he tossed the bag (minus the wallet) in a dumpster at a construction area at the edge of the lot. In his office there was a phone message waiting for him from Nailom, the local assistant prosecutor and an old law school buddy. Bramston returned the call. Nailom suggested they get together for a drink.

Over a couple of Laiphroigs across the street at O'Malley's, Nailom conceded that the evidence against Jocko was relatively weak, and he wasn't actually sure that Jocko had actually done anything at all. But Doris was pressing hard for him to pursue the case and Nailom thought the evidence was enough to give him a reasonably good shot at convincing a jury. Under the circumstances, it would be difficult to even consider dropping the charges, especially since the chief prosecutor (Nailom's boss) had recently adopted a hard line on domestic violence cases. Nailom offered a fairly generous plea deal.

Bramston knew that Nailom had Doris' eyewitness statement that she'd seen Jocko through her living room window, peering in through the drapes. Thinking that was all he had, Bramston's initial inclination was to reject the plea offer out of hand. And he said so. Then, however, Nailom went on to say he also had a Converse sneaker print, the same shoe size as Jocko's, found in the dirt outside Doris' window. While Nailom admitted that a search of

16. What should Bramston do about the sneakers in the dumpster?

17. In the event that Doris testifies at trial, would it deny Jocko effective representation of counsel if Bramston refuses to follow Jocko's instructions to destroy Doris's credibility (and her reputation), even if he believes he can get Jocko an acquittal without doing so? Is it okay for Bramston to destroy her reputation in order to increase the chances of acquittal even if he thinks that Jocko is actually guilty?

18. Suppose the local disciplinary authorities pursue Bramston for the way he cross-examines Doris, charging him with using “means that have no substantial purpose other than to embarrass, delay, or burden a third person,” in violation of Model Rule 4.4. Suppose also that, in the course of defending against these charges, Bramston mentions that he threw away a bag containing sneakers that belonged to Jocko and, when specifically asked to name the brand, he said Converse. Does Bramston have any legitimate complaint if the Disciplinary Committee then makes an official finding that he destroyed evidence in violation of Model Rule 3.4(a), and recommends him for suspension?

V.

Glen Durridge has operated a small computer sales and service store near the State University for the past several years. Part of his business is selling new equipment, but one of his

primary sources of revenue comes from refurbishing and reselling used computers and peripherals. He borrowed a substantial sum of money from the Third National Bank to start up and, while he has much less debt now, he still must take additional loans from time to time to tide him over in slow cash-flow periods—such as August and early January.

Durrige had his own lawyer to set up the business and to help him with the legal work on the first loan. When that lawyer retired, Durrige just relied on the bank’s lawyer, another private practitioner named Burts, and he even took to calling on Burts when, on other miscellaneous occasions, he had a legal question or two that needed answering.

Last month while Durrige was in the midst of getting approval on a new loan from Third National, federal agents came to his shop with a search warrant. It turned out that one of his customers, Gussy Hobbes, was found by a repair technician to have some child-pornographic materials on her home computer. Hobbes said she had bought the computer refurbished from Durrige and claimed the images must have been already on it when she bought it. In any case, pursuant to the search warrant the federal agents took a number of used hard drives that Durrige had on hand in his shop, mostly ones he’d swapped out in order to install larger drives in machines he was refurbishing.

Durrige was worried because he knew he’d “deleted” images from most of these hard drives at the time he’d removed them from their original computers. As he knew very well, the technology is such that it’s practically impossible to totally erase anything from a hard drive (short of physically destroying the drive) so anything that was on the drive would probably be still recoverable via advanced forensic techniques. In other words, it is probably still possible for the federal agents to determine the character of the images that were on the drives when Durrige acquired and “erased” them. Durrige’s fear is that some of the deleted images may well have been of the sort that are illegal to possess under federal law and that he might be blamed for them.

Durrige called Burts and told him about the search and his concerns. Burts replied initially that he didn’t quite understand some of the technical aspects but, he added, “the loan will be approved by noon today, and maybe we can talk about it more when you come in to the bank this afternoon to pick up your money.”

19. Did Burts have any conflict of interest issues in continuing to do the loan papers and helping Durrige with other legal questions after Durrige’s own lawyer retired?

20. Suppose that Burts had been solely Durrige's attorney in the current loan transaction (and not attorney for the bank). Would he need to do anything about the information he's just received from Durrige between now and this afternoon, when Durrige is expected to pick up his money? (Needless to say, if Durrige is sent to prison or even just indicted, there's a real good chance that he'll default on this new loan.)

<End of examination>