PROFESSIONAL RESPONSIBILITY
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Comments on the Final Examination

Having read all the answers to the final examination, I have written a few comments about them. The text below is not intended to serve as a "model answer." I spent more than six hours preparing this document, I exceeded the word limit, and I consulted whatever sources I pleased. Accordingly, I did not expect that any exam taker would address all of the issues that I discuss below.[1] Instead, this document exists to list some of the main points that students could have raised in response to the questions calling for narrative answers, and it also identifies a few common mistakes. The purpose is to enhance the exam's utility as a teaching tool.

While not everything I discuss below applies to each student's answer, I have focused on issues of broad relevance.

Question 1 [one-half (50 percent) of the narrative answer portion of the examination]

A colleague at your law firm sent an email message to the ethics counsel concerning three potential new clients, and the ethics counsel asks you to draft a reply to the message. What do you write?

Various issues are presented.

(1) The former band member (bassist): Potential conflict with former client

The band's former bassist was once married to the band's current drummer (*i.e.*, to one of the firm's potential new clients), and the firm represented the bassist in the bassist-drummer divorce. Accordingly, the bassist is a former client. Because the divorce became final in 2009, the bassist is not likely to be a current client, absent unusual circumstances.

Under Rule 1.9(a), "A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing."[2] The question is whether the new matter is "substantially related" to the divorce. The test is whether "a substantial risk [exists] that confidential factual information as would normally have been obtained in the prior representation would materially advance the [new] client's position in the subsequent matter." *See* Rule 1.9 cmt. [3]. If somehow the new matter is

[1] That said, these comments are by no means exhaustive; my failure to address an issue in this document does not necessarily mean that a student was erroneous in discussing it on the exam. These comments are too brief to acknowledge every good point I read while grading.
[2] References to a "Rule" refer to the ABA Model Rules of Professional Conduct.

substantially related (*e.g.*, the bassist and drummer have a complicated alimony arrangement, and the musicians want the firm to arrange the band's structure to minimize benefits to the bassist), then the firm would need consent from the bassist (which I imagine would be difficult to obtain). If the new matter is not substantially related to the firm's matrimonial work for the bassist, then the firm may take action adverse to the bassist's interests (*e.g.*, representing the band in an intellectual property dispute against the bassist concerning songs written before the bassist left the band).

Also, under Rule 1.9(c), the firm may not use information related to the representation of the bassist "to the disadvantage of the former client except as these Rules would permit or require with respect to a client." So, again, the firm cannot use information learned during representation of the bassist against the bassist.

My guess is that Rule 1.9 will not preclude the firm from taking the new work. Chances are, back in 2009 no one thought much about the potential revenue of a band that, even today, makes little money and has members supporting themselves with day jobs. In that case, a reasonable lawyer in the firm's position would not have been likely to learn important information that could be used against the bassist when establishing the band's formal legal structure today. The answer will depend, however, on the facts.

(2) Concurrent conflicts: Conflicts with bassist and among current band members

Note too that if the firm believes its representation of the musicians would be materially limited by its obligations to the bassist, that presents a concurrent conflict under Rule 1.7(a)(2). Chances are, if there is no Rule 1.9 problem (see above), this won't be a real issue.

Speaking of Rule 1.7, a concurrent conflicts problem is presented by the existence of three potential clients who desire to be represented by the same law firm as they establish a business. The firm might ask some questions to determine whether the band members might have divergent interests. For example, if one band member writes the songs, will that member get all the royalties associated with authorship, or will those be shared equally? (Different bands have different distribution schemes.) In general, how will the band members divide revenues (*e.g.*, from concerts, merchandise, etc.)? Have any band members made financial contributions to the enterprise already (*e.g.*, musical instruments) and, if so, is reimbursement expected? How will the band account for future contributions from members between now and when the band's anticipated new revenues begin flowing? Who will control the corporation once it is created? If a band member quits one day, will that band member retain any rights to the band's music (or name, goodwill, etc.)? Whom may the firm represent if the band breaks up? If the firm is to represent the band itself (*see* Rule 1.13, organization as client), what happens if a band member becomes adverse to the organization?

Conflicts like these are quite common. Business partners often seek concurrent representation, and the potential conflicts illustrated above are likely "consentable" (*i.e.*, "waiveable"). *See* Rule 1.7(b). The firm should be sure to discuss potential conflicts with the would-be clients and to obtain consent, confirmed in writing. Relevant information would include the effect of joint representation on confidentiality and the attorney-client privilege. Chances are, the band members will be willing to

waive any conflicts to gain the economies of scale associated with joint representation, but the choice is theirs to make in an informed way.

(3) Fee arrangements

The would-be clients have proposed providing a "share of the band's future income in exchange for [the firm's] legal services." Assuming the economics of this idea make sense to the firm (is the band ever actually going to have any money?), which is a question outside the scope of this memo, a few ethical issues are presented by the proposal.

First, any fee charged must be reasonable. *See* Rule 1.5(a). Determining whether a fee such as this is reasonable could be quite complicated. For example, are such fees common among musicians? If so, what are the normal terms (*e.g.*, what percentage of what revenues are collected, and for how long)? The reasonableness might depend on the probability that the band will succeed. If the band is a longshot (*i.e.*, likely never to earn revenues), then a higher percentage of potential earnings could be appropriate. More research may be required.

Further, the proposed fee arrangement would be a "business transaction" with a client and is accordingly regulated by Rule 1.8(a). Under that rule, "the transaction … [must be] fair and reasonable to the client and [its terms] fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client."[3] Whether the terms are "fair and reasonable" is a question similar to the Rule 1.5 "reasonable fee" question.

Also, the client must be "advised in writing of the desirability of seeking and [be] given a reasonable opportunity to seek the advice of independent legal counsel on the transaction," and the client must eventually give "informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction." Note that the musicians need not actually obtain separate counsel; informing them of the "desirability" is enough.

As for the other creative fee proposal—involving the media rights to the drummer's "sensational divorce"—this idea is fraught with peril. First, does the firm really want to be in the business of exploiting media rights concerning the divorce of two clients (one current, one former)? Is there even any money in this? With respect to the ethical issues, it seems unlikely that the firm can produce a book about the divorce without using confidential information related to the work for the bassist, which (as discussed above), is prohibited by Rule 1.9(c). *See also* Rule 1.8, cmt. [5]. Even if the firm learns the same information from the drummer, the information is probably not generally known, and in any event, it will be difficult to establish how the firm came to learn any particular fact without piercing privilege and confidentiality rules. (Perhaps the firm could sell the media rights to a third party and thereby avoid any involvement in the production of the book. That would solve the Rule 1.9(c) issue but could nonetheless still appear unseemly.) Note that this scheme is also a business transaction covered by Rule 1.8(a). This idea is not prohibited by Rule 1.8(d) ("Prior to the

[3] Rule 1.8(i) does not apply here because there is no "litigation" or "cause of action" involved.

conclusion of representation of a client, a lawyer shall not make or negotiate an agreement giving the lawyer literary or media rights to a portrayal or account based in substantial part on information relating to the representation.") because it concerns rights to an already-concluded matter.

(4) Engagement letter terms

Counsel desires to insert two provisions into the musicians' engagement letter. The first would provide an advanced waiver of future conflicts of interest. The second would require that any malpractice claims against the firm arising from this work go to binding arbitration.

The advanced conflicts waiver is probably a bad idea.[4] The theory is that one day, a new client might wish to hire the firm to sue the musicians (*e.g.*, if they trash a hotel room). If the firm is still representing them, then a concurrent conflict would exist under Rule 1.7(a) because the new representation would be directly adverse to the interests of the musicians. In theory, the conflict might be consentable, but odds are the musicians would not consent at the time to the firm representing their litigation adversary. *See* Rule 1.7(b) (explaining need for consent). (This analysis presumes, of course, that the firm would not represent the musicians in the lawsuit. Of course the same firm can't be on both sides of the litigation. Additionally, should a future conflict be non-waiveable, no advanced waiver can be effective.) If the musicians have consented in advance, however, their annoyance at the time of the new lawsuit would not stand in the way of the firm's new litigation work (say, on behalf of a hotel).

The problems with this plan are many: First, even if the idea works at a technical level, it will almost certainly infuriate the musicians and cost the firm whatever business the musicians are still providing at the time. Second, the advance waiver may not be enforceable. While such waivers are common at large law firms in their representation of sophisticated clients such as multinational banks, *see* Rule 1.7 cmt. [22], these musicians are not sophisticated consumers of legal services. (Consider that they have proposed paying for the firm's work with media rights to a divorce, a payment plan not generally used by Citigroup.) In order for the musicians to give informed consent to this plan, the firm's lawyers would need to carefully explain the purpose and effect of the advanced waiver (*e.g.*, perhaps by explaining the firm's desire to represent a hotel against the musicians in future litigation), which might well prevent the musicians from hiring the firm at all.[5] Finally, unless the firm is still representing the musicians when a lawsuit arises, the musicians will not be "current clients" at all, meaning the advanced waiver will not be necessary. If the musicians are former clients, then Rule

[4] For a general discussion of these provisions, see Michael Downey, "Broad Advance Waivers of Future Conflicts and *Galderma,*" (*St. Louis Lawyer*, April 2012); *see also* Lerman & Schrag, *Ethical Problems in the Practice of Law* (3d ed. 2012), pp. 398-400 [hereinafter "Casebook"].

[5] As Comment 22 explains, factors affecting the potential enforceability of advanced waiver clauses include, among others, (1) whether the clients were represented by independent counsel during the negotiation of the clause (such as in-house counsel for a major corporation hiring an outside firm), (2) "the extent to which the client reasonably understands the material risks that the waiver entails," (3) whether the client "is an experienced user of the legal services involved," and (4) the specificity of the description of what precisely is being waived (*i.e.*, the less precise the description of what conflicts are being waived, the less likely the clause will stand up to scrutiny).

1.9 (instead of Rule 1.7) applies, and Rule 1.9 already allows representation adverse to former clients in many situations without the former client's consent (see discussion of bassist above).[6]

As for the mandatory arbitration clause, that's no problem as long as the musicians truly understand the concept. *See* Rule 1.8 cmt. [14] (stating that while Rule 1.8(h) prohibits a lawyer from entering an agreement prospectively limiting malpractice liability unless the client has separate representation to negotiate the provision, the rule "does not, however, prohibit a lawyer from entering into an agreement with the client to arbitrate legal malpractice claims, provided such agreements are enforceable and the client is fully informed of the scope and effect of the agreement").

(5) The associate and the singer

One of the firm's associates has "hit it off" with the singer from the band, and the two of them are headed out to dinner. This raises a potential issue under Rule 1.8(j), which provides: "A lawyer shall not have sexual relations with a client unless a consensual sexual relationship existed between them when the client-lawyer relationship commenced."[7] One (more clever than practical) idea is for the two diners to begin a sexual relationship immediately (or at least before the firm begins providing legal advice to the musicians), thereby causing the sexual relationship to predate the lawyer-client relationship.[8] A more sensible idea is for the associate to avoid working on legal matters for the musicians. Rules 1.10 and 1.8(k), which generally impute conflicts and prohibitions affecting one lawyer to the entire firm at which the lawyer works, do not impute conflicts created by sexual relationships. *See* Rule 1.8 cmt. [20]. Because the legal work desired by the musicians is fairly small in scope, assigning the associate to other matters should not present too much trouble.

Question 2 [three-tenths (30 percent) of the narrative answer portion of the examination]

You are the general counsel of a major American consumer products corporation. Your boss, the CEO, ordered your office to conduct a full internal investigation of some alleged wrongdoing. Because you are busy, you plan to delegate most of the work to two associate general counsels, whom you recently hired.

Before they begin their work, the associate general counsels ask you two questions:

(a) Are we permitted to interview HugeSeller employees whom we suspect broke the law?

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[6] Rule 1.9 might nonetheless get in the way. If the firm possesses detailed knowledge of the band's finances, a Rule 1.9(c) issue may arise; that rule prevents a lawyer from using information obtained in the representation of a former client against the former client. This problem would probably not be ameliorated by an advanced conflicts waiver.

[7] I realize that the facts do not make clear that a sexual relationship is even a possibility. Perhaps the associate just likes music, and we should all get our minds out of the gutter. That said, better safe than sorry. Most students seems to spot this issue without too much difficulty.

[8] The workaround may not be available; perhaps the lawyer-client relationship has been formed already despite the absence of a signed engagement letter. *See* Casebook at 285-93.

Yes, you may interview HugeSeller employees, as long as you follow certain rules. Indeed, attempting to interview the employees is probably required by Rule 1.1 (competence), Rule 1.3 (diligence), and Rule 1.13 (organization as client). It's hard to conduct an internal investigation without interviewing witnesses.

(b) If so, what must we do to avoid getting in trouble related to these interviews?

You must be careful, however, to obey Rules 4.2 and 4.3 (among others). Under Rule 4.2, you may not speak to a person you know to be represented in a matter about the subject of the representation. So if you know a HugeSeller employee has outside counsel for the DOJ investigation (or for the related conduct more generally), you can speak to the employee only if the employee's lawyer consents; the consent of the client is not sufficient.

Chances are, most of the employees won't have counsel. (Note that while Rule 4.2 does prohibit certain contacts with employees of organizations that are represented, that issue does not affect you because in this case, you represent the organization. That rule is designed to prevent outside counsel from contacting your people, not to prevent from the organization's own lawyer from contacting its employees.) You must therefore follow the provisions of Rule 4.3, including (1) not implying that you are disinterested, (2) clearing up any misunderstandings concerning whom you represent, (3) avoiding misleading statements in general, and (4) giving no legal advice to the employees other than perhaps the advice to seek other legal counsel. Further, pursuant to Rule 1.13(f), you should make especially clear that you represent the company, not the employees. It would also be smart to give an "*Upjohn* warning," making clear that while your conversations with the employees are being conducted to assist with the giving of legal advice, that advice is for the corporation, not the employees, meaning that any attorney-client privilege associated with the conversations belongs to the corporation, which may waive the privilege if it so chooses, regardless of the desires of the employees.

(c) Is the behavior of the associate general counsels your problem?

Yes, their behavior is your problem. Under Rule 5.1(a) you must make reasonable efforts to ensure that lawyers in the General Counsel's office abide by the rules of professional conduct. (You are a "partner" under Rule 5.1(a). *See* Rule 5.1 cmt. [1].) Similarly, Rule 5.1(b) requires the same reasonable efforts because you have "direct supervisory authority" over other lawyers. Further, under Rule 5.1(c), you could be held responsible for rule violations by your subordinates if you order wrongdoing, ratify it, or fail to mitigate wrongdoing you discover while mitigation remains possible.

Beyond Rule 5.1, the basic duties of competence and diligence require that you properly supervise lawyers conducting an investigation into activity under review by the DOJ. Failure to properly attend to the work of your subordinates could constitute malpractice or could get you fired.

You later receive some new information:

What do you do about the CEO's plan to destroy documents and cover up wrongdoing?

First, you cannot assist in the document destruction plan. Among other things, the plan would violate Rule 3.4(a), which states that lawyers may not "unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value," nor may they "counsel or assist another person to do any such act." Here, you know the DOJ is investigating, and the documents appear relevant. Beyond the ethical rules, destroying the documents could constitute obstruction of justice (*i.e.*, a crime) and—assuming HugeSeller is a publicly traded company under the supervision of the SEC—could violate provisions of Sarbanes-Oxley (and regulations promulgated thereunder). See also Rule 1.2(d) ("A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent.").

Under Rule 1.13(b), unless you can convince the CEO to abandon her destruction plans, you are required to "report up," that is, to inform the CEO's superiors (which in this case is presumably the board of directors).

A tougher question is whether you may (or must) "report out," that is, outside the company, if the board of directors somehow fails to stop the wrongful conduct. Rule 1.13(c), which allows some reporting out in the interest of an organization client, may not apply here because of Rule 1.13(d) ("Paragraph (c) shall not apply with respect to information relating to a lawyer's representation of an organization to investigate an alleged violation of law."). Then again, perhaps the cover up is not "related to" the underlying environmental violations that are the subject of the internal investigation. Were I the GC here, I'd seek legal advice (allowed under Rule 1.6(b)(4)) from an ethics expert.

In addition to Rule 1.13(c), Rule 1.6 provides a potential avenue for outside disclosure. *See* Rule 1.13 cmt. [6] ("Paragraph (c) of this Rule supplements Rule 1.6(b) by providing an additional basis upon which the lawyer may reveal information relating to the representation, but does not modify, restrict, or limit the provisions of Rule 1.6(b)(1)-(6)."). Under Rule 1.6(b)(2), a lawyer may reveal confidential client information "to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services." Destroying the documents would probably be a crime, and one might argue that the corporation "has used or is using the lawyer's services" to find the documents in need of destruction. Also, depending on what water has been contaminated (and with what), Rule 1.6(b)(1) might apply. If Rule 1.6(b) allows disclosure, then disclosure is probably made mandatory by the interaction of that rule and Rule 4.1(b), which states that when representing a client, a lawyer may not "fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6."

Similar analysis may relate to the plan to "make sure" employees "involved in the dumping" "don't blab to anyone else." It will depend on whether the "don't blab" advice is legitimate (*e.g.*, advice to speak with counsel before speaking to authorities), part of a conspiracy to obstruct justice (*e.g.*, advice to lie to authorities), or something in between.

Question 3 [one-fifth (20 percent) of the narrative answer portion of the examination]

Like Missouri, your state has not adopted any amendments to its equivalent of Model Rule 1.10 that allow a law firm to avoid the imputation of conflicts if a new lawyer (who joined the firm upon leaving a different private law firm) "is timely screened" and other requirements are met.

The state supreme court justice for whom your work seeks a memo answering this question:

"Should we adopt the ABA Model Rule, keep our existing Rule 1.10, or do something else?"

This question asks of a state should adopt a certain provision of the ABA Model Rules. Good answers contained a concise explanation of what the proposal would do (and how it differs from current state law). For example, one might have written:

"Under the proposed new version of Rule 1.10, when a lawyer leaves one private law firm for another firm, conflicts related to former clients represented by the old firm (which are regulated by Rule 1.9) would not be imputed to the remainder of lawyers at the new firm, meaning that other lawyers at the firm can represent persons adverse to the new lawyer's former clients (even in the 'same matter' or 'substantially related' matters), so long as the new lawyer is properly screened from the conflicting work; the screen must prevent the firm from using confidential information learned by the new lawyer against the former client. If the new firm uses a 'screen,' then it need not obtain consent from the new lawyer's former client."

"Under current state law, screens do not remove the need for consent. The new lawyer's Rule 1.9 conflicts related to former clients are imputed to all lawyers at the new firm, meaning that unless the former client consents, the new firm cannot represent someone in the 'same' or a 'substantially related' matter whose interests are materially adverse to the former client."

Several students seemed to misunderstand the effect of the proposal on the need for consent. A statement like "the proposal makes sense because if the formal client objects, she can always refuse to consent" demonstrates confusion. The point of the amendment is to allow screening as an alternative to obtaining consent. Confusion was also demonstrated by answers suggesting that the amendment would effect concurrent conflicts (*e.g.*, by allowing two lawyers at the same firm to concurrently represent adversaries in the same matter, so long as the firm has a screen).

Students who found the proposal confusing were wise to consult the Gillers supplement at pages 246-47 (2013 concise ed.) and the Casebook at page 506.

A good answer then took a position on the proposal (arguing in favor of its adoption, or against it, or suggesting some other course of action). Most students seemed to approve of the proposal; good answers could take any position. Regardless of one' position, a student left points behind by not offering any counterarguments.

Some good arguments in favor of the Model Rule included:

- The lack of imputation makes it easier for lawyers to change firms because under the old rule, new firms will hesitate to hire anyone bringing along a bunch of conflicts.

- In today's legal profession, lawyers change firms a lot (often not by choice, *e.g.*, if they are laid off), and we should do what we can to help them find work. (Related: The old rule is antiquated.)

- The new rule contains sensible safeguards (*e.g.*, written notice to the affected former client, screening as defined by Rule 1.0(k), the details of which must be given to the former client, the ability for review of the screen by a tribunal, etc.), meaning former clients are unlikely to be hurt.

- The new rule gives clients more options when hiring counsel.

- Adopting the rule would promote uniformity among the states.

- Under current law, former clients can (and do) deny consent for no good reason, just to make life more difficult for their adversaries. If a new lawyer joins the Tokyo office of a large firm, there is no sense in imputing conflicts to lawyers in the Jefferson City office.

Some good arguments[9] against the amendment included:

- Rules 1.9(a) and (b) do not prevent *all* work adverse to former clients; the rule covers only substantially related matters (and the same matter). So the scope of conflicts a lawyer will bring to a new firm is not huge.

- Relatedly, when Rule 1.9 does apply, a former client has a strong interest in avoiding adverse representation by a firm employing a lawyer who knows confidential information that could be used against the former client. *See* Rule 1.9 cmt. [3] (defining "substantially related" with reference to "a substantial risk that confidential factual information as would normally have been obtained in the prior representation would materially advance the [new] client's position in the subsequent matter").

- Screening is unlikely to work and, in any event, the former client has no way of assessing whether a given screen is really working. The written notice is useless.

- Appeals to a tribunal are annoying, expensive, and unlikely to vindicate the former client's interests.

- Imagine a lawyer represents Former Client in his divorce, learning all sorts of sensitive information about Former Client's business. Now, the lawyer joins a new firm, and that

[9] The inclusion of an argument here (or in the previous list) does not imply my agreement, only that it could sensibly have been part of a good answer.

firm is representing an adverse party in a business dispute against Former Client. That just looks terrible.

- If the conflict isn't so bad, the former client can already consent under current law. If the former client refuses to consent, the new firm probably shouldn't be handling the new representation.

"Other" ideas included:

- Adopting Massachusetts's version of Rule 1.10 (or other state variations). See the Gillers supplement for options.

- Adopting the Model Rule with the limitation that screening is not permitted if the disqualified lawyer took a leading (or "substantial") role in the former matter.