

LEGAL PROFESSION

Fall, 2002

Professor Terrell

FINAL EXAMINATION

Time Allowed: 3 hours, 15 minutes

INSTRUCTIONS:

1. This is a **closed book** examination. You will be given a copy of the "Model Rules of Professional Conduct" (without the comments) for this examination.
2. You have a maximum of 3 hours and 15 minutes to complete the examination.
3. The examination consists of nine questions. Please make certain that your copy of the examination contains all nine.
4. **YOU MUST RETURN YOUR COPY OF THE EXAMINATION WITH YOUR EXAMINATION ANSWERS.**
5. There are 131 total raw score points available on the exam. The raw score points available on each question are noted at the beginning of each question, along with a suggested time allotment for each question corresponding to the relative number of raw score points available on that question.
6. **Note:** The *average* amount of time allotted to each question is about nineteen (19) minutes. (If you follow this guide, you will finish in under three hours.) Your answers will therefore necessarily be relatively short. Make them efficient and to the point. However, they also should be thorough. **This will require you to explain your conclusions, not simply state them. And you should make appropriate citations to the Model Rules when they are relevant to your analysis and answers. Citations to other sources, such as the *Restatement of the Law Governing Lawyers* or other versions of the Rules, are welcome and will be considered favorably, but are not "required" for a good answer.**
7. At any point in this examination, if you believe you lack crucial information for an adequate answer, you are entitled to *note* the information you believe you need, and if necessary make a reasonable assumption concerning that information. You must be explicit about such notations and assumptions.
8. Any announcements concerning the examination shall be made in the room assigned for the examination and the typing room.
9. Good luck.

Question One
(12 raw score points; 16 minutes)

"My name is Jon Cline and I have an urgent ethical problem. I'm a public defender in Alaska. I was appointed to represent a guy named Morrell who was charged with kidnapping. While Morrell was in jail awaiting trial, he let a friend, Wagner, use his place and his car. Wagner cleaned the car and found a pad on which, in Morrell's handwriting, is the outline of a plan for the kidnapping. This is conclusively incriminating stuff. Wagner brought me the pad. After I read the plan, I asked Wagner to take it back. Maybe I shouldn't have done that, but I sure as hell didn't want it. Wagner picked up on my anxiety and said no way was he going to take it back. This was this morning. Now I've got it, and I don't even know where to begin to go for quick advice. So I came to you."

Question Two
(16 raw score points; 21 minutes)

"You talk about a sweet situation. Things don't fall together like this very often.

"I represent Mary in a divorce. She's married to Stan, who is represented by one of the partners at Sullivan & Sheets -- the biggest law firm in town -- and this guy is one of the most arrogant, overbearing jerks I've ever met. Anyway, Stan is a very successful businessman who owns Basicorp. Basicorp, however, is presently involved in a big tax dispute with the government, and it's represented by Sullivan & Sheets as well.

"Well, Mary tells me of a rumor she's heard that Basicorp's accountant, who is an old friend of hers, has been modifying the company's books and records to give it a stronger case against the government. I just had a little informal chat with this accountant, and he confirmed the rumor! (How I got him to talk is another story I'll have to tell you sometime.) But this guy begs me not to say anything to anyone.

"As if this isn't good enough, my partner Bob, who recently came to the firm from the local prosecutor's office, tells me the police have been developing several other possible criminal charges under State law against Stan and Basicorp, but the cops lack some crucial information about some meetings that Stan held at his home. Mary, however, knows all about those meetings! She can basically put ol' Stan in jail.

"Mary and I are meeting with Stan and his lawyer tomorrow. I can't wait to unload these tidbits on them. They'll fold in a flash.

"So, why are you frowning?"

Question Three
(22 raw score points; 27 minutes)

Liz has come to your office and related the following story:

She is the owner and manager of a Burger Queen franchise in town. She recently agreed to settle a lawsuit she had brought against the Burger Queen company for what she contended were slow deliveries of supplies, and delivery of poor quality supplies, all of which she believed was part of an effort by the company to harass her. She is convinced that the company wants her to relinquish her franchise so the company can give it to someone else.

The terms of the settlement of her suit, however, simply give her the right to inspect the supplies at the company's warehouses before shipment, and to check the company's shipping manifests to see if her franchise is being neglected. She says she was very dissatisfied with this settlement when it was presented to her by her lawyer, but she says her lawyer told her that the Burger Queen company emphatically denied her allegations, and that going to trial would be very expensive, time-consuming, and risky given the facts. She says she therefore decided, very reluctantly, to accept the settlement offer.

She had been represented in the litigation by the firm of Prince & Pauper, a respected medium-sized firm in town, while Burger Queen was represented by King & Wilson, a very large, multi-city law firm. Liz has come to you because she is now furious with Prince & Pauper, and particularly with the partner there who handled her case. Her anger is based on the following facts she has learned after much informal detective work:

-- Prince & Pauper has for several years represented Hank Sellum, a very successful local businessman who owns, among other properties, the Taco Quickie franchise across the street from Liz's Burger Queen, which is her most direct competitor;

-- Prince & Pauper started as a firm seven years ago as a split-off from King & Wilson, and the two firms have maintained a cozy relationship, often referring legal work to each other;

-- The partner at Prince & Pauper who was Liz's lawyer, along with the partner at King & Wilson who was Burger Queen's principal lawyer in Liz's matter, both jointly represent a company currently involved in a major securities fraud case;

-- Prince & Pauper represents the Taco Quickie company in all its labor disputes around the country;

-- The Burger Queen company is owned by a huge conglomerate company called Monarch Foods which recently (immediately after Liz's case was settled) hired Prince & Pauper to handle a very large real estate transaction; and

-- The partner at Prince & Pauper who was Liz's lawyer is married to a partner at King & Wilson.

Liz wants to report all these lawyers (at Prince & Pauper and King & Wilson) to the State Bar Association's disciplinary committee, and perhaps sue them for malpractice. What do you advise?

Question Four
(14 raw score points; 20 minutes)

"Recently I was hired by three individuals whom I will call Dash, Kennedy, and Snyder. They were charged with first-degree murder. Dash and Kennedy were accused of actually committing the murder, and Snyder was charged under the felony-murder rule. If convicted they could each get life in prison without parole. In due course I raised the idea of plea bargaining with the prosecutor, Tina Chambers, who told me that she would accept a plea to murder two [second-degree murder], which would make my clients eligible for parole in 20 years. But Tina insisted that all three had to plead guilty or the deal was off. She figures if she's going to try one, she'll try them all. Well, I told this to my clients. Dash and Kennedy said they wanted to take the deal, but Snyder would not. The fact is, Tina has a better case against Dash and Kennedy than she has against Snyder. I told Tina I thought Snyder better get another lawyer, but Tina said it didn't matter any to her because whether there was one defense lawyer or two or three or ten, she still wasn't going to accept a deal unless each defendant pled to murder two. Actually I think it's a pretty good deal, even for Snyder who, because he wasn't a triggerman, will probably get paroled after twenty years. The others I'm not so sure, but at least they'd have a shot. So what do I do now?"

Question Five
(14 raw score points; 18 minutes)

In the following situations, would the information received by the attorney, or the information being sought by the other side, be covered by either the attorney-client privilege or the ethical duty to preserve confidences, or both? Explain.

- I. Lawyer L is defending client C in a civil action brought by the buyer of C's former business. The plaintiff is claiming that C misrepresented the value of the business prior to the sale. L suggests that C hire a tax accountant to examine C's records, to talk with C, and to prepare some worksheets for L to use in defending the case. The accountant turns the worksheets over to L.
- II. Lawyer L is defending C in a robbery case. C's co-defendant in the case is X, who is represented by lawyer A. All four of them meet to discuss the case and potential defense strategies. C is accompanied to the meeting by his mother, and A brings one of his firm's paralegals. The prosecutor asks L and C what was discussed at the meeting, and C seems inclined to talk.
- III. On the afternoon of August 11th last year, a woman walked into your law office, stated her name, and said in confidence: "I'm the driver the police are looking for in that fatal hit and run accident last week." You agreed to represent her, and you advised her about the wisdom of surrendering to the police, but she rejected your advice. The police have never discovered the identity of the hit and run driver. Just prior to the expiration of the statute of limitations, the parents of the hit and run victim filed a wrongful death action against a Jane Doe defendant. Acting on a hunch, the parents' lawyer has subpoenaed you as a deposition witness and has asked you for the names of all persons who consulted you on the afternoon of August 11th.

Question Six
(10 raw score points; 14 minutes)

What is the relationship, if any, between the concept of "negotiation ethics" (that is, the application of Rule 4.1 to negotiation situations) and the concept of "professionalism"?

Question Seven
(12 raw score points; 14 minutes)

I do personal injury. Plaintiffs. Small stuff, no big deal, but I make a living, okay? Mostly car crashes. I get my share of whiplash, sprained backs, pain and suffering. It's all contingency, okay? Client hires me, I'll call him Pinocchio. You know what's coming. Intersection accident. Question is who had the right of way. Usually the two insurance companies split the difference, I get my cut, lawyer for other guy gets his. Or hers nowadays.

We're at Pinocchio's deposition and the lawyer says to my guy "I see you wear contacts. You were wearing them at the accident?" His license says he's got to. My guy says "no, glasses." What he told me too. Okay? Lawyer says "prescription?" Clever dude, right? Client says yes. Lawyer's still suspicious. Asks if he brought them to the deposition like the notice said. Pinocchio produces them. Lawyer puts them up to the light. He says "deemed defendant's four for identification" – "deemed" so we don't actually have to attach a sticker to them -- then gives them back. Later, I tell Pinocchio I'd better hold onto them, they're being deemed and all, if he doesn't mind. He says, get this, he's got to give them back to his son.

What it turns out is these were the glasses Pinocchio was wearing, like he said. And they're prescription, too, like he said. But they're not Pinocchio's. Okay? They're his son's. Day of the accident, Pinocchio picked them up by mistake on the way to his car. By the time he realizes they're not his, he's pulling out of the garage and thinks what the heck, he's just running down to the video store to get *Terminator II*. On the way to which the accident happens. I mean, Jeez, okay? This is only a four, five thousand case I'm lucky. I don't need the trouble. So what do I do now, you're so smart?

Question Nine
(17 raw score points; 22 minutes)

The scene below involves the case of *Trover Software v. Vachel*. The defendant, Rachel Vachel, has been called to the stand to testify. She will be examined on direct by her attorney, Carl Rochlin, and on cross by opposing counsel, Ann Connover.

Judge: Proceed, Mr. Rochlin.

Rochlin: Ms. Vachel, you are the defendant here?

Vachel: Yes.

Rochlin: And you have also filed a counterclaim for retaliatory discharge?

Vachel: Yes.

Rochlin: What is your understanding of the claim against you?

Vachel: That I revealed a client confidence without authority.

Rochlin: Will you tell the court about your relationship with Trover Software, the plaintiff?

Vachel: I am -- was -- its in-house lawyer. I was hired by Ted Trover shortly after he started the company.

Rochlin: Has the company changed since you started with it?

Vachel: Greatly. As we heard yesterday, it is now a leading designer of special application software for the aeronautic and space industries. But in other ways, it is still the same, closely-held company Teddy started fifteen years ago.

Rochlin: Where was Trover located when you joined it?

Vachel: Our main office was in a building on Chester Avenue. But we went from 32 employees to 400 by the time I left . . . was fired. So we rented lots of auxiliary space throughout the county.

Rochlin: Did there come a time when Trover decided to move?

Vachel: Yes, about two years ago. We got new business from foreign aircraft manufacturers that required us to find new space. I negotiated a tax abatement agreement with the county and a construction loan with First Financial.

Rochlin: What were the plans for the Chester Avenue property?

Vachel: To sell it. After the move, we would all be in one office.

Rochlin: How did you come to occupy the Chester Avenue building?

Vachel: When Teddy started, he rented it from a soft drink bottler in financial trouble. Then he bought it at foreclosure.

Rochlin: Please tell the court how Trover Software set about selling the Chester Avenue office.

Vachel: We hired a broker who was going to compile a portfolio consisting of pictures of the property and the surrounding neighborhood, maps, tax and zoning information, and architectural and engineering reports. The broker hired an environmental laboratory to test the water, air filtration and circulation systems, insulation, and the water table and soil.

Rochlin: Did the lab prepare a report?

Vachel: Yes and no. Like all the reports, it was prepared in draft and given to the company for review. Two weeks later the company took the building off the market, although our own move was going through.

Rochlin: Did you ever learn why?

Vachel: Westy Shoob, the CFO, remarked at a budget meeting a week later that the draft report showed traces of benzene and arsenic in the ground water and undersoil. The lab had urged further tests to identify quantities and ascertain whether either chemical had seeped into the local reservoir.

Rochlin: What was your awareness about the dangers of benzene and arsenic?

Vachel: They are fatal even in small doses.

Rochlin: Could these chemicals have been generated by Trover.

Vachel: No, Trover doesn't use them. They would have come from the bottler who sold us the property, but went bankrupt years ago.

Rochlin: What did you do next?

Vachel: I went to talk to Greta Holsom.

Rochlin: And Ms. Holsom, of course, is the President of Trover, correct?

Vachel: Yes. She came from one of the mainframe companies after Teddy's sudden death three years ago.

Rochlin: By the way, Ms. Vachel, please tell the court how you viewed your relationship with Ms. Holsom.

Vachel: It was bad. Call it bad chemistry. I don't know. I think she wanted to get rid of me from the day she arrived.

Connover: Objection, your honor, to this witness's testifying to Ms. Holsom's State of mind.

Rochlin: I offer it only to show what Ms. Vachel believed Ms. Holsom thought about her.

Connover: On that basis, it's irrelevant.

Judge: Ms. Connover is correct. I'll strike it.

Rochlin: What did you tell Ms. Holsom?

Vachel: I told her I had learned about the draft report and asked what she intended to do. She said she didn't believe the draft was accurate, that Trover had done its environmental due diligence when it bought the property from the bottler. But since Trover was going to begin a major renovation of the property anyway -- to increase its market value -- it would clean up the soil and water table as an added precaution.

Rochlin: Did Ms. Holsom say anything about a connection between the lab report and the decision to take the property off the market?

Vachel: She denied any connection. She said the company took the property off the market because the real estate market was bad. We would do the renovation while waiting for it to improve.

Rochlin: Did you give Ms. Holsom any further advice?

Vachel: Yes. I told her about a new state law that says that anyone possessing information that certain chemicals, including benzene and arsenic, have been released to the environment must report that information to the State Department of Environmental Affairs within 30 days.

Rochlin: And if they don't?

Vachel: It's a misdemeanor and can also be the basis for a treble damage civil claim.

Rochlin: What was Ms. Holsom's response?

Vachel: She said that she and the Board had discussed the matter fully and had decided to proceed as described. She added that even rumors about benzene and arsenic in the ground water could wreck Trover. Rumors would scare new customers and jeopardize our financing and the tax abatement deal. She was also fearful that plaintiffs' lawyers would solicit baseless claims from the users of the reservoir and former Trover employees.

Rochlin: What happened next?

Vachel: I thought about it. I checked the legislative history of the statute, which has not yet been litigated. I concluded that the statute's reference to "any person possessing information" included me as well as Trover. On advice of counsel, I decided I had to inform the State Department of Environmental Affairs about the environmental lab's report.

Rochlin: Before doing so, did you alert Ms. Holsom?

Vachel: Yes. I told her that if Trover did not report the information, I would.

Rochlin: What did she say?

Vachel: She fired me on the spot and gave me two hours to clear out. I left that day and I haven't been back since.

Rochlin: Did you then inform the Department?

Vachel: Yes.

Rochlin: What have been the consequences to you as a result of the events you've described?

Vachel: It's been more than two years. I can't get another job. I lost stock options and pension rights at Trover. I lost my medical benefits. I'm financially and emotionally destroyed.

Rochlin: Are you aware of the results of the investigation of the State Department of Environmental Affairs?

Vachel: Yes. It found that the ground water had been contaminated with benzene and arsenic, but that the amounts were small. Trover agreed to pay for the clean-up without admitting liability. And it did.

Rochlin: What happened to Trover's business?

Vachel: The move got put on hold for a year while the county and the bank awaited the results. But I understand Trover has since moved and sold the property.

Rochlin: No further questions.

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Conover: Good afternoon, Ms. Vachel.

Vachel: Ms. Conover.

Conover: When you spoke to Ms. Holsom, she told you that Trover planned to clear up the soil and water table as part of the renovation, correct?

Vachel: Yes.

Conover: Did she detail those plans?

Vachel: Somewhat.

Conover: Are you aware of what the State Department of Environmental Affairs ultimately required Trover to do?

Vachel: More or less.

Conover: How did it differ from the plans Ms. Holsom described?

Vachel: They were about the same.

Conover: In fact, the Department approved Trover's plans without change, didn't it?

Vachel: I think so.

Conover: And after the work was done, tests showed no arsenic or benzene in the soil, correct?

Vachel: I believe that's correct.

Conover: You were present yesterday for the testimony of Dr. Mellinkoff, weren't you?

Vachel: Yes.

Conover: She testified that the delay cost Trover \$9 million, didn't she?

Vachel: Yes, she said that.

Conover: Do you have any reason to challenge that figure?

Vachel: I don't know either way. I know it cost Trover money to renegotiate the financing and tax abatement, plus the delay in construction. And it lost one of the new contracts.

Conover: Are you aware of lawsuits against Trover as a result of the publicity you generated?

Rochlin: Object to "you generated."

Judge: Yes, strike it.

Conover: Are you aware of lawsuits?

Vachel: Some people sued.

Conover: Isn't it accurate that there are 12 pending lawsuits seeking damages in excess of \$25 million?

Vachel: I don't know the exact numbers.

Conover: Ms. Vachel, as a lawyer, do you have a duty to protect the confidences and secrets of your client?

Vachel: Yes, but here . . .

Connover: Was your knowledge of the alleged arsenic and benzene confidential information of your client?

Vachel: Yes, but . . .

Connover: And you don't deny that the delay and publicity surrounding your revelation of this information cost your client money, putting aside the exact amount? You don't deny that, do you?

Vachel: No.

Connover: Isn't it a fact that Ms. Holsom fired you only after you said that you were going to reveal confidential information of your client?

Vachel: Yes. But the state law required it.

Connover: Does that law say a lawyer must reveal a client's confidential information?

Vachel: It doesn't say anything either way.

Connover: So you chose to resolve any ambiguity against your client, didn't you

Vachel: The law has no exception. People could have died.

Connover: Thank you. No further questions.

Judge: Redirect, Mr. Rochlin?

Rochlin: Just a little, your Honor. Ms. Vachel, why did you reveal confidential information of your client?

Vachel: After speaking with counsel, I concluded that I was legally obligated to do so under the statute. Also the confidentiality rule permits disclosure where a client is committing a criminal act that is likely to result in imminent death or substantial bodily harm.

Rochlin: Do you agree that you were fired because you revealed a client's confidential information?

Vachel: No. I was fired because I did what I was legally required and ethically permitted to do.

Rochlin: Is that the basis for your retaliatory discharge claim?

Vachel: Yes.

Rochlin: No further questions.

Based on this scene:

- (a) Discuss any legal ethics issues you think pertinent.
- (b) Assess Vachel's claim for retaliatory discharge.