



The University of New Mexico

School of Law Library
MSC11 6080
1 University of New Mexico
Albuquerque, NM 87131-0001
Telephone (505) 277-0939
FAX (505) 277-0068

This document was scanned pursuant to the express permission of its author and rights holder.

The purpose of scanning this document was to make it available to University of New Mexico law students to assist them in their preparation and study for Law School exams.

This document is the property of the University of New Mexico School of Law. Downloading and printing is restricted to UNM Law School students. Printing and file sharing outside of the UNM Law School is strictly prohibited.

NOTICE: WARNING CONCERNING COPYRIGHT RESTRICTIONS

The copyright law of the United States (Title 17, United States Code) governs the making of photocopies or other reproductions of copyrighted material.

Under certain conditions specified in the law, libraries and archives are authorized to furnish a photocopy or other reproduction. One of these specified conditions is that the photocopy or reproduction is no to be "used for any purpose other than private study, scholarship, or research." If the user makes a request for, or later uses, a photocopy or reproduction for purposes in excess of "fair use," that user may be liable for copyright infringement.

This institution reserves the right to refuse to accept a copying order if, in its judgment, fulfillment of the order would involve violation of copyright law.

Examination No. _____

750 ETHICS

Semester II, 1995-96

UNM School of Law
Final Examination
Three Credit Hours

Professor Rapaport
Tuesday, April 30, 1996
9:00 a.m.-12:30 p.m.

INSTRUCTIONS

This is a three and one-half exam. The questions are designed to be answered in three hours. There is an additional one-half hour for organizing and preparing your answers.

In preparing your answers, you may consult any class materials, including casebook and rules pamphlets, and notes or outlines prepared by you or you working with classmates, and any treatise or hornbook; you may not consult commercial outlines.

Assume that the New Mexico Rules of Professional Responsibility are in force. There are two parts to the exam: In answering the questions in **Part I** (Essays), you should make reference to the rules where relevant, and give an analysis of the problems under the rules. You should also feel free to criticize the rules and to employ other perspectives, if the rules do not provide solutions you find adequate. Treat **Part II** (Short Answer and Multiple Choice), however, purely as an exercise in the rules; answer each question based only on the New Mexico Rules.

The time suggested for each question roughly reflects its weight in grading.

Please write legibly, in ink, on one side only of each bluebook page, and please write only on every other line. Check to make sure your copy of the exam contains all twelve pages including this page.

GOOD LUCK!

[Exam begins on next page]

750 Ethics
Final Examination

Professor Elizabeth Rapaport
Semester II, 1995-96

Question 1. (30 minutes)

Henry Duval is a sole practitioner in Biloxi who does mostly divorce work. He refers to himself as being "feisty," and "a warrior for my clients." Some lawyers who have crossed swords with him, in and out of the courtroom, prefer to describe him as "overzealous," "unprofessional," and "just this side of disreputable."

Recently Henry represented a woman who claimed that her husband was chronically unfaithful to her. Believing her, Henry hired an investigator to follow the man, but no evidence of a current affair materialized. Henry then hired a woman to lure the husband into a liaison, and this tactic was successful. Not willing to risk everything on the credibility of the woman alone, however, Henry instructed her to make several phone calls to the husband and make surreptitious tape recordings of them.

Henry further advised: "All we need is a couple of minutes of tape; if hubby gets suspicious and asks if you are taping, just lie, honey, just lie." This tactic also paid off, and Henry jubilantly put the tape -- complete with the decoy's indignant denials that she was taping -- in his office safe.

When the wife revealed that she would soon be seeking a divorce, the husband hired counsel of his own, who asked for a preliminary meeting with Henry. At that meeting, the husband's lawyer demanded to know what grounds the wife would rely on, and whether she had any evidence of adultery or other marital misconduct. Not wishing to tip his hand yet, and hoping to instill a false sense of security that the recent affair had not been discovered, Henry declined to specify the grounds he would rely on, and falsely stated that he had no incriminating evidence.

Surreptitious tape recording is not against either federal or Mississippi law, so long as one of the parties to the conversation has consented to the taping; accordingly, the tapes probably would have been admissible in evidence. No trial was ever held, however, because after the complaint was filed, Henry used the tapes as leverage in subsequent negotiations, and secured a highly favorable settlement for his client.

750 Ethics
Final Examination

Professor Elizabeth Rapaport
Semester II, 1995-96

Mississippi has adopted verbatim the same version of the Model Rules of Professional Conduct as that of New Mexico, and the husband's lawyer reported Henry's conduct to the State Disciplinary Commission. One of the staff attorneys called Henry in to respond to the charges informally, as is the practice in Mississippi. Henry listened politely, but responded in his typically brusque fashion:

Son, I just heard you tell me a story that a sore loser told you, but I didn't hear you add any interesting rule numbers to the story. Rule three-o-what? Rule four-o-what? Rule eight-0-what? All the facts are true, but all I am guilty of is representing my client to the best of my ability -- and within the law, to boot.

When they outlaw drug buys, then maybe I will stop using decoys, and when they outlaw bugging phones, I'll definitely stop getting my operatives to bug phones. And, shoot, if I can't lie to another lawyer in his office, then who in the heck can I lie to?

IS HENRY'S CONDUCT -- OR SOME OF IT -- A VIOLATION OF THE RULES OF PROFESSIONAL CONDUCT? SHOULD IT BE? DISCUSS FULLY.

Question 2. (1 hour)

You are a licensed New Mexico attorney. Several years ago you began to represent a client named Robert. Since that time you have acted as Robert's lawyer on a number of occasions. Robert has come to rely on you not just for technical legal advice but for advice and counsel.

Last week Robert came to see you. It seems that Robert's physician had diagnosed Robert as having advanced stage pancreatic cancer. Pancreatic cancer is incurable. The diagnosis was confirmed at the Mayo clinic.

Robert has always been a proud, independent person. He tells you that he does not want to cause his wife and children significant grief by a prolonged illness, nor does he wish to

750 Ethics
Final Examination

Professor Elizabeth Rapaport
Semester II, 1995-96

subject his family to the extensive financial costs of a prolonged illness.

You told him that you could help him by drafting legal instruments that would instruct his physicians not to engage in heroic efforts to prolong his life when his cancer begins to impair his day to day activities. You also begin to tell him about "do not resuscitate" instructions when Robert cuts you off. "I've considered all that, he says, "but I've decided on a more direct approach." It seems that Robert has contacted Dr. Kaye, a physician who believes in euthanasia. Dr. Kaye has constructed a machine that enables a person to self administer a fast acting sedative and poison and thus to commit suicide painlessly. Dr. Kaye sells the machine for \$25,000.

Robert wants you to represent him in two ways. First, he wants you to handle the purchase of the suicide machine from Dr. Kaye. Robert has authorized you to pay up to \$25,000 and to draft and review all necessary legal documents. Robert tells you that Dr. Kaye insists that the sale include a "hold harmless" clause, a waiver of liability and remedy for any resulting death or injury resulting from intended use of the machine, and a general release. These documents would prevent Robert's wife and children from recovering against Dr. Kaye for Robert's wrongful death. Robert tells you he is agreeable to these demands by Dr. Kaye.

Second, Robert wants you to draft a will for Robert that will leave all his property to his wife and children. He also wants you to prepare the necessary documents so that his life insurance will be paid to his wife. Because the insurance policy was taken out years ago, Robert initially named himself as beneficiary. (You are to assume that the life insurance will be paid even if Robert's death is deemed suicide.) The change will allow Robert's wife to obtain the insurance free of probate.

750 Ethics
Final Examination

Professor Elizabeth Rapaport
Semester II, 1995-96

The New Mexico Penal Code contains the following statute:

Assisting suicide

30-2-4. Assisting suicide consists of deliberately aiding another in the taking of his own life. Whoever commits assisting suicide is guilty of a ... felony.

DISCUSS ALL LEGAL ETHICS ISSUES RAISED BY ROBERT'S REQUESTS TO YOU.

Question 3. (45 minutes)

In 1992 Jane Smith, an employee of the Symbionese Corporation (Corporation), brought a class action against Corporation alleging sex discrimination. Smith was represented by Jim Button, of the well known labor law firm of Button, Hook and Eye. Corporation was represented by Madonna DaVinci, an attorney on the corporate legal staff of Corporation.

While preparing for discovery, DaVinci learned that Corporation had indeed discriminated against Smith and its female employees, including DaVinci herself, in the manner and to the extent alleged in Smith's complaint. She learned this through information obtained from Corporation's personnel department and from reading inter-office memoranda regarding the Smith case. She also stumbled upon information that Corporation routinely conducted unauthorized surveillance and background investigations (including wiretaps, credit record inspections, interviews with past friends and relations, and the like) of its female (and not male) employees, arguably in violation of state and federal law (including criminal law). DaVinci had no idea that Corporation was engaged in such practices until she began preparing for discovery in the Smith case.

DaVinci was no longer a happy camper. She contacted Button, explained that she learned while working on the Smith case that she herself was discriminated against by Corporation, and asked him to file a motion seeking leave for her to intervene in the Smith action as a member of the plaintiff class. As soon as

750 Ethics
Final Examination

Professor Elizabeth Rapaport
Semester II, 1995-96

DaVinci mentioned that she was working on Corporation's defense in the Smith case, Button admonished DaVinci not to reveal to the Button firm any information received in confidence from Symbionese, but rather to confine revelations to them to the facts of her own case. DaVinci wants to participate on the plaintiff's side only as a party, not as an attorney.

Questions:

- 1) May Button accept the representation of DaVinci?
- 2) May DaVinci pursue her employment discrimination claim against Corporation?
- 3) May DaVinci tell other female employees of Corporation what she has learned, and encourage them to join in the Smith action as plaintiffs?

Part II. Short(ish) Answer and Multiple Choice

1. Short Answer Questions. (20 minutes)

Please note the specific page limitation on the length of your answer that precedes each question. "Page" here means, as usual, writing on every other line. (Those who have unusually large writing who may use a little more space.) Your answer should be based on the applicable rule or comment, which you should identify. You are not asked to critique the rules but rather to explain how they apply to these fact situations.

For Yucca Transport (YT) ("Flower of the Southwestern Highways"), 1996 has not been a good year thus far:

In January, a YT truck collided with a passenger car; the driver of the car, Paul Passenger, was injured and is bringing a personal injury action against YT.

In February, the same YT driver was involved in an accident with a horse van; a valuable brood mare was injured. The owner of the mare, Jerry Breeder, is suing YT. YT fired Larry Longhaul, the driver of the truck involved in both accidents.

750 Ethics
Final Examination

Professor Elizabeth Rapaport
Semester II, 1995-96

In March, Larry brought an action for wrongful discharge against YT.

In the personal injury case arising out of the January accident, YT's insurer is represented by attorney David and Paul Passenger is represented by attorney Pam. The insurance company has in fact authorized David to settle the case for a maximum of \$100,000. At a negotiation session with Pam, David states, "I am authorized to settle this case for \$50,000. Pam states, "my client won't take less than \$75,000. In fact, Pam has discussed settlement with Peter Passenger, and Peter is willing to accept \$60,000. to settle the case.

Write no more than one page each in answer to a) and b):

- a) It was unethical of David to lie (puff or fudge?) about how much he was authorized to settle for. YES__ or NO__? WHY?
- b) It was unethical for Pam to lie (puff or fudge?) about what her client would settle for. YES__ or NO__? WHY?

In the horse van accident case David once again is representing the insurer and Pam is representing the owner of the mare, Jerry Breeder. At a meeting between David and Pam, David smells alcohol on Pam's breath; Pam, who has a reputation for impeccable fashion, looks disheveled. Before David can say much of anything, Pam offers to settle the case for \$10,000, if David will give Pam a check "right away." David and the insurance company had evaluated the case as worth between \$25,000. and \$50,000. David suspects that Pam is looking for a quick fee.

Write no more than two pages in answer to c):

- c) What ethical duties does David have in this situation?

Write no more than one page in answer to d):

- d) May counsel for plaintiff driver Larry Longhaul in the wrongful discharge case claim in negotiation that the discharge caused Larry emotional distress when in fact he has taken the loss of his job in stride?