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Telephone (505) 277-0939

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750 ETHICS

Semester II, 1997-98

UNM School of Law
Final Examination
Three Credit Hours

Professor Rapaport
9:00 a.m. - 12:30 p.m.
Friday, May 8, 1998

INSTRUCTIONS

This is a three and one-half hour 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. 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.

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 seven pages including this page.

GOOD LUCK!

[Exam begins on next page]

Question 1. (one hour)

Immediately after law school Miguel Vigil joined the tax department of a large Ciudad del Duque firm, Best & Brightest (B&B). He started out writing memoranda of law on issues of statutory and regulatory interpretation common to most of the firm's tax work. Later, he was assigned to work on specific cases in litigation, but usually just pieces of them, taking a deposition here, briefing a motion there. He was never given complete responsibility for a case or client in his own right.

In the course of his work he had "as-needed" access to all client tax records and information kept in the firm's files, and could request additional information from clients if a partner approved the request. Among the clients for whom he worked, mostly preparing tax returns, writing opinion letters, and documenting tax-related activities, was WOOF, a Las Cruces, New Mexico television station.

Three years of "tax associate" work left Miguel feeling a little numb. He wanted to see more of the legal universe. Remembering his very interesting contacts with WOOF management, he decided on communications. He asked for, and the firm granted, a two year leave of absence to work for the Federal Communications Commission in Washington, D.C. On first arriving at the Commission he worked on a broad range of issues, but eventually came to specialize in the area of children's television. He wrote position papers, drafted proposed legislation, testified before Congress, authored administrative regulations, gave advisory opinions, and otherwise worked on all aspects of the Commission's efforts to regulate the content of messages targeted at children. He did not participate in any of the Commission's litigation on the subject only because the lawsuits pending when he arrived were expected to last beyond his projected stay.

After two years of what seemed at times to be mostly expanding his understanding of the possibilities of animation, Miguel returned to B&B, as a member of the patents, communications and intellectual property department. Within a year of his return, B&B split up, with two-thirds of its lawyers, including the entire tax department, forming the new firm of Sleeker, Smaller & Better, and the remaining one-third, including the patents, communications and intellectual property department, continuing to practice under the name of Best & Brightest. Both firms thrived, and Miguel's reputation as a highly respected communications lawyer grew.

About a year and a half after the split, Miguel was approached by Janis Joplin, a representative of KIDS (Kill Inane and Destructive Shows), a children's advocacy organization active in the Southwest. KIDS asked Miguel (and B&B) to represent it in a pending lawsuit against seven New Mexico television stations, including WOOF, challenging the stations' failure to comply with new federal rules regulating the number

and duration of commercials permitted during the Saturday morning "children's" time slot." The statute established the new rules creating a private right of action which allowed organizations like KIDS to sue offending stations directly, and to obtain injunctive and monetary relief, including punitive damages. The KIDS law suit asked for both types of relief. (Punitive damages, if assessed, would be set in an amount sufficient to deter the defendant(s) in the future, and thus would be based on part on the defendants net worth.) When KIDS filed the lawsuit it was represented by another law firm, but it had become disenchanted with that firm's performance, fired that firm, and now wanted Miguel and the B&B firm to take over.

The conversation with Joplin, it turns out, was not the first time Miguel had heard about the KIDS lawsuit. About six months earlier, Jerry Lee Lewis, Miguel's closest friend from the pre-split days at B&B, and now a senior partner in Sleeker, Smaller & Better, had told Miguel about an identical case over dinner. Lewis had explained in detail how a television station client of his had been sued for failure to comply with a new federal statute regulating the amount of commercial time in children's programs, how the station would (and should) lose the lawsuit if it came to trial, but how by attacking the constitutionality of the statute he (Lewis) could drag out the station's defense, increase the stakes for the plaintiff, and use these factors to bargain for a favorable settlement. (Apparently Lewis did not know Miguel had worked on children's television issues while at the Commission, and Miguel did not tell him.) The discussion was about legal theories rather than factual ones, and did not include any revelation of evidence or witness testimony. Lewis did not use proper names in describing the case, but Miguel now realizes that he must have been talking about the KIDS lawsuit; the facts were too unusual for there to be two such cases. Besides, WOOF was Lewis' client at B&B, it had followed him to the Sleeker firm, and Miguel had learned from Joplin that Lewis was representing WOOF in the KIDS lawsuit.

The KIDS lawsuit was familiar to Miguel for another reason. While at the Commission he had worked on a preliminary draft of the statute establishing the new commercial time limits, the same statute under which KIDS was suing. He did not draft the time provisions themselves, but he did write a preamble to the statute, explaining its history and setting forth the Commission's views on how it should be interpreted. The KIDS law suit was premised on a more expansive reading of the statute than the preamble articulated, however, and Miguel had concerns about whether he could argue this expansive interpretation, having drafted the narrower one in the statute. Personally, he agreed with the KIDS interpretation, and had even argued for it within the Commission before the statute was submitted to Congress; but he had lost that argument, written the preamble in narrower terms, and now wondered whether he could argue the other way in court.

Miguel would like to take the KIDS lawsuit, but he is afraid that if he does WOOF (in the person of Lewis) will move to disqualify him and his law firm from the representation, and that the Federal Communications Commission will join in the motion. (He expects the Commission would like to have the test case for the new statute brought by a plaintiff more sympathetic to the Commission's point of view.) He told KIDS of his concerns, and it said it would prefer to have him as its lawyer as long as the motion to disqualify could be defeated. If the motion was likely to be granted, KIDS would prefer to avoid the expense and delay of arguing a losing hand and just hire a different law firm now.

You are an associate at B&B. Miguel said to you, "I recall that you are a graduate of UNM, and studied legal ethics with Rapaport." "True on both counts," you reply, modestly lowering your gaze. Miguel then asked you to prepare a memorandum of law outlining the arguments which WOOF and the Commission could make in support of a motion to disqualify both him and his law firm, the responses he and the firm might make, and your judgment about how a court would rule on each of the arguments. He has also asked if there is anything he, the firm, or KIDS can or should do in anticipation of such a motion, to increase the likelihood that the motion would be denied.

Question 2. (30 minutes)

Sid Citizen, a second year law student, sued Mary Jones, a member of the Enchanted County, New Mexico, Sheriff's Department for assault and battery allegedly occurring during a traffic stop as Citizen was leaving a performance by the Blue Yuccas at the Hip Coyote Performance Center in October, 1997. Jones was demoted from "chief inspector" to "station sergeant" while the Citizen case was pending because she had deceived a Sandia County court in another matter. Carol Counselor, Jones' counsel, knew of the demotion and the reason for it, but decided not to reveal this information to the Citizen court. To avoid inadvertent disclosure, Counselor had Jones appear at the Citizen trial in plain clothes, did not ask Jones' name and rank when identifying her on the stand, and consistently referred to her as "Mrs." Jones. In addition, neither Counselor nor Jones corrected the judge or Citizen's lawyer when they referred to Jones as "chief inspector," and on cross-examination Jones gave the answer, "Yes, that is true," to the question, "You are a chief inspector, and you have been on the force, you told us, since 1958, is that true? The jury found for Jones, concluding that there was no assault and battery.

Was Counselor's conduct improper in: 1) not informing Citizen's counsel of the demotion as soon as it occurred?; 2) instructing Jones to appear in plain clothes and addressing her as "Mrs."?; 3) failing to correct plaintiff's counsel and the judge when they addressed

Jones as "chief inspector"?; 4) failing to have Jones correct her misleading cross-examination testimony, or, if Jones would not do so, failing to correct the testimony for her?

Question 3. (one hour)

My name is Tommy Thomas. For several years now I have represented Mariposa Enterprises, a family-owned corporation that holds some investment rental properties in Ciudad del Duque, where I have practiced law for twenty years. Mariposa gives us some regular business doing closings if they buy or sell a building, evictions when some deadbeat won't pay the rent, and sometimes some zoning work. Mariposa is owned by five members of the King family, but all of my contact is with the oldest son, Lowell.

Lowell recently decided to sell a large Victorian downtown; its been cut up into three apartments. The buyers were a young couple, Richard and Theresa Smith. They want to gentrify the place; live there themselves while renting out one unit and fixing up the third. Its pretty run down; needs quite a bit of work. They offered Lowell considerably less than he wanted, so he asked me to help him try to seal the deal. We all met at his offices; they might have been intimidated by meeting at mine. They did have a lawyer with whom they consulted and who was advising them on this deal, but she didn't usually come with them when they were talking to Lowell, and she wasn't with them for this meeting. She did show up at the closing, as you will see in a moment; that didn't surprise me of course.

The meeting was productive; I did a pretty good job in getting these yuppies to agree to a price close to what Lowell wanted. They were pretty green for young professionals. They didn't know much about the tax breaks of owning the property as a business, and they never asked about lead paint, which is everywhere in the place, since it is an old building. Lowell asked me to lie about that if they asked, and I said I couldn't do that, but he said he would lie if they asked him about it. I just let that pass --- I can't control what he does, but I sure won't get caught lying myself. Fortunately, it never came up, because they never asked about lead paint. They told us they were going to rent the second floor to friends of theirs with four kids all under the age of 7 (I think they're 6, 3 and newborn twins), so the Smiths will be in big trouble when the renters find out about the paint. I know that lead paint is supposed to be poisonous for young children who chew on the chips, or so the personal injury lawyers and legal aid lawyers say, but I grew up in an old house and it never hurt me. Anyway, Lowell and I really sold this young couple. We both stressed that it was a great place to raise kids, nice back yard, lots of room, nice residential neighborhood; neither of us mentioned the plans, not yet completely public but not secret either, for a Walgreens to go in right next door. As

Lowell said, "if they knew about the Walgreens, they would hardly be likely to give me my price!"

The closing was a few weeks after this meeting. I brought to the closing a letter I wrote to the buyers with the usual: "all proper and necessary title and zoning, etc., etc. have been confirmed, as per the enclosed papers," something like that. The letter goes with all those documents that the seller gives to the buyer and the bank, the papers that promise good title, no zoning problems, no liens or mortgages, and so forth. Standard stuff, from my experience. Lowell had prepared and signed a federal "Lead Paint Disclosure" form which said that "The sellers have disclosed all information available to them about the presence, if any, of lead paint on the premises and the Buyers hold the Sellers free from liability resulting from any lead paint." I should have thought about that form, but I didn't really think about it before they all showed up at my office for the deed transfer. Its a federal requirement that the form be included in the closing, so I was not about to squelch the deal by telling Lowell he couldn't use his form. So I said nothing.

The Smiths brought their lawyer, Jane Hamilton, to the closing, but she seemed to be if anything less sophisticated than they were. She never asked anything about the lead paint statement (I think she just missed it in the mess of papers that everybody was signing). And she didn't catch Lowell's usual trick of throwing in an extra couple of hundred dollars in charges on the tax reconciliation form for "taxes accrued" that he says he'll have to pay since the tax bill comes to him for the next installment before the city hall records get changed. It's a game he and plenty of others play; most lawyers pull out their calculators and catch the error. Lowell says, "Sorry," and corrects the math. Hamilton never even checked the numbers. I can't believe they paid her for this. Maybe it was one of those "favor for a friend" things and she didn't get paid.

But now Lowell has been served with a lawsuit by a new lawyer the Smiths hired-- one of those young hotshots from UNM. And this one studied with that woman, Ravenport, or whatever her name is; you know the one I mean. The Smiths are claiming fraud and unfair practices, and a slew of things, prominently featuring the lead paint issue and the "tax reconciliation" ploy. The suit was followed quickly by a Notice of Deposition of me!

I understand that you are THE expert when it comes to lawyers' ethics. I assume I did nothing wrong but I want to be sure. I also need to know how much, if anything, I can or must say in this deposition. I am assuming that everything I spoke about with Lowell is confidential. That's what I learned in law school and that's what I told Lowell when we first started to work together. Tell me what you think. Thanks.

Question 4. (30 minute)

Discuss the following proposition:

Any requirement that lawyers report misconduct of other attorneys is completely unenforced and unenforceable, and increases disrespect for the rules governing professional responsibility generally. It would be better to have no rules requiring reporting of attorney misconduct than to have one that is violated all the time.

[End of Examination]