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BAUM
FALL 2008

FINAL EXAMINATION
750-370 ETHICS

This is a three-hour examination. The exam consists of two essay questions and six multiple choice questions. The first essay question is worth 170 points. The second essay is worth 100 points. The multiple choice questions are worth a total of 150 points, six questions at 25 points each.

This exam is **CLOSED BOOK**. You may **NOT** refer to any print materials including your casebook, your class notes, and your course outline. You may **NOT** use electronic databases or other research materials.

In your answers, you are to apply the Model Rules and comments, cases, and ethics opinions to the facts and to provide references to and analysis of relevant provisions of the Model Rules and relevant case law and ethics opinions to demonstrate your reasoning and to support your conclusion.

To receive full credit for each question, you must identify the correct rule and offer relevant language or a paraphrase of language from the rule or the rule comments, state a definite conclusion or answer, and support your conclusion/answer through complete presentation of all steps in your reasoning and reference to relevant authority. References to case names and base rule numbers are sufficient as citation; reporter cites and rule subsections are not required. If you do not recall a rule number, you must specify the subject matter of the rule.

For the multiple choice questions, you are to indicate the best MPRE answer **AND** provide a brief discussion of the reasons for your choice—why that answer is the best and why the others are incorrect or not as good as the best answer. Your explanation must include the relevant Model Rule number(s) or an accurate description of the subject matter of the rule. The correct answer choice is worth five points; the explanations for each answer option are worth five points each. Your answers for each multiple choice question should include the following elements:

- Correct MPRE answer

- Explanation for the MPRE answer, including reference to the rule and application of the facts to the rule demonstrating the reasons that the answer is the best answer

- Explanations for each incorrect answer set out separately by answer option letter with a brief discussion of the reasons that each answer is not correct based on the rules and facts

If you find any ambiguities in the facts or questions posed, identify the assumptions you make to resolve the ambiguities and then proceed with your answer.

Your answers are to be concise and directly relevant to the question asked or fact pattern provided. Rambling and imprecise answers will not receive full credit.

Please use the following formatting for your answers. If handwritten, your answers are to be single-sided. If typed, your answers are to be single-sided and double-spaced with 1" margins at tops, bottoms and sides of pages. You are to return your exam questions with your answers.

QUESTION ONE (170 points) (90 minutes)

You are a lawyer in a jurisdiction which has adopted the ABA Model Rules of Professional Conduct as drafted by the ABA. You have been retained by the large local law firm, Suem & Billem (hereinafter sometimes called "the firm"). Like most large law firms, the firm has a Legal Ethics Committee to which the firm lawyers look for advice concerning potential ethics problems. Recently, the Legal Ethics Committee has been swamped with work, and because the lawyers on the Committee are occupied with other firm business -- including work for their own clients -- the firm has asked you to prepare legal memoranda concerning each of the fact situations described below.

A. The firm represents Smith & Jones, another local law firm, in a legal malpractice case filed against Smith & Jones by a former client. The case against Smith & Jones was filed two years ago and has resulted in two years of extensive discovery: the case is scheduled to go to trial next month.

In a totally unrelated matter, Suem & Billem represents Local Power Company in a law suit against a supplier of power cable. Smith & Jones represents the supplier. This case has also been pending for several years. The lawyers at Suem & Billem who represent Local Power Company were unaware that other lawyers in the firm were defending their opponents, Smith & Jones, in the malpractice action. It was reasonable for them to be unaware because the "client" to which the legal malpractice case is billed is the malpractice insurance company which retained Suem & Billem to defend Smith & Jones.

The Suem & Billem lawyers who represent Local Power Company want to file a motion in that case seeking sanctions against Smith & Jones for violating Rule 11 of the Federal Rules of Civil Procedure based on a "frivolous" summary judgment motion Smith & Jones filed in that case. However, these lawyers have just learned that the firm represents Smith & Jones in the unrelated malpractice case.

1. The firm wants to know if the fact that Suem & Billem represents Smith & Jones in the unrelated matter prohibits the firm from filing the Rule 11 motion. If yes, why? If no, why not? When addressing this question, consider only the rules of professional conduct; do not raise issues of civil procedure.
2. The firm wants to know if it must report Smith & Jones to the state bar disciplinary board for filing its "frivolous" motion. If yes, why? If no, why not?

B. For over twenty years, Suem & Billem has represented Large Drug Company, serving as general counsel to the company. Recently, a representative of Plastic Container Company called a senior partner at the firm, John Smith, and told Smith he wished to discuss a matter with him. The firm had never represented Plastic Container Company. Anticipating a new client, Smith agreed to see the Plastic Container Company representative the next day.

During the new client interview, Plastic Container Company revealed that it wanted Smith to bring an anti-trust action against a number of drug companies, including Large Drug Company. In this civil anti-trust action for treble damages, a complaint would be

forwarded to the Criminal Division of the United States Department of Justice seeking criminal anti-trust action against the drug companies, including Large Drug Company. Of course, Smith informed Plastic Container Company that he could not accept the case because his firm represents Large Drug Company.

The question has been raised as to whether Smith can relay the information that he learned about the anticipated anti-trust action to Large Drug Company. There has been no publicity about this matter. As far as Smith knows, Large Drug Company is totally unaware of the contemplated civil and (potential) criminal actions. Can Smith tell Large Drug Company what he knows? If yes, why? If no, why not?

C. Suem and Billem represents Major Manufacturer in a product liability case brought against Major Manufacturer by Plaintiff who was allegedly injured when Major Manufacturer's power lawn mower exploded and injured Plaintiff. Major Manufacturer has asked Suem and Billem to hold certain documents for the company, including the manufacturer's safety evaluation department report about a design flaw in a similar model of lawn mower. This report might indicate that the lawn mower at issue in Plaintiff's case could have been easily corrected with a slight price increase in the price of the lawn mower. Major Manufacturer's in-house counsel was copied on the safety evaluation department's report. In discovery, Plaintiff's lawyer has requested all documents related to the design and manufacture of the lawn mower which allegedly injured Plaintiff. The firm wants to know: 1) if the rules of professional conduct allow the firm to hold the documents for the manufacturer and 2) if attorney-client privilege protects the safety evaluation department report.

QUESTION TWO (100 points) (45 minutes)

Admission to the bar requires passage of the bar exam and a determination that the applicant possesses the proper character and fitness to practice law.

In a persuasive essay reflecting on the values of the legal profession and of the U.S. legal system, argue your position on these requirements. In developing your essay, you are to consider the following questions but you may discuss other concepts that relate to the bar admission requirements as well. In your essay, you are to reference specific rules from the ABA Model Rules of Professional Conduct and explain the connection of those rules to the bar admission requirements. You may also consider the N.M. standards for character and fitness, the N.M. Creed of Professionalism, and other materials from the course. Be sure that you support your position with authority and solid and complete reasoning.

1. Do you agree or disagree with these requirements?
2. If you agree with these requirements, why do you agree?
3. If you disagree with these requirements, what changes should be made in bar admission requirements?
4. What values are evident from these two basic requirements for admission to our profession?

5. Where are the values that you identified reflected in the ABA Model Rules of Professional Conduct?

MULTIPLE CHOICE (WITH EXPLANATION) (150 points) (45 minutes)

For the multiple choice questions, you are to indicate the best MPRE answer AND provide a brief discussion of the reasons for your choice—why that answer is the best and why the others are incorrect or not as good as the best answer. Your explanation must include the relevant Model Rule number(s) or an accurate description of the subject matter of the rule. If more than one rule is implicated by the problem, be sure that you discuss all.

The correct answer choice is worth five points; the explanations for each answer option are worth five points each. Your answers for each multiple choice question should include the following elements:

Correct MPRE answer

Explanation for the MPRE answer, including reference to the rule and application of the facts to the rule demonstrating the reasons that the answer is the best answer

Explanations for each incorrect answer set out separately by answer option letter with a brief discussion of the reasons that each answer is not correct based on the rules and facts

To ensure that your answers are easily understood, in your bluebook or your laptop answer, provide the following information for each question: the question number, the letter for the answer you selected as the correct answer, and your explanation for each possible answer (A-D) being correct or incorrect.

1. Attorney Apple represents Paul Plaintiff in a medical malpractice case against Doctor. Paul maintains that Doctor negligently performed surgery on Paul's back. After a court hearing, Spectator stopped Attorney as he was walking out of the courtroom. Spectator told Attorney that Paul rear-ended him last week in a hit-and-run accident. Spectator wants Attorney to represent him in a personal injury suit against Paul.

May Attorney represent Spectator in the personal injury suit against Paul?

- A. No, because Attorney represents Paul in the medical malpractice lawsuit.
- B. No, unless Spectator consents to the representation after seeking independent advice.
- C. Yes, because the medical malpractice suit is unrelated to the personal injury suit.
- D. Yes, because the representation of Spectator in the personal injury suit would in no way affect the representation of Paul in the medical malpractice suit.

2. Attorney was appointed as counsel to City. As a result of a dramatic increase in case volume, Attorney hired four associates, including Lawyer. Within four months of Attorney's appointment, three of his associates had resigned. Many of the city officials who had supported Attorney's appointment began to call for his dismissal.

By this time, Lawyer was doing the work of three associates as well as performing the tasks Attorney needed to accomplish, including serving as City’s lead trial counsel. One of the complaints from City’s governing officials was the lack of specificity in Attorney’s billing. Mayor, who now worked closely with and was quite pleased with Lawyer, asked Lawyer to review the bills Attorney had submitted. While Lawyer’s bills were quite specific, referencing cases and actions performed, Attorney frequently billed eight hours for “attention to litigation matter.” The dates of some of these bills coincided with dates Lawyer knew Attorney had done no work, but had played golf with private clients. Lawyer advised Attorney of his discovery and of Lawyer’s intention to notify the appropriate authority. Attorney suggested Lawyer reconsider or else Lawyer would be terminated. Fearful that he would not be able to meet his financial obligations, Lawyer decided not to refer Attorney to the proper authority. Is Lawyer subject to discipline?

- A. No, because an associate is not responsible for the actions of his supervising attorney.
- B. No, if Lawyer’s financial obligations are significant.
- C. Yes, unless Attorney was removed as counsel to City.
- D. Yes, because Attorney’s false billing claims involve dishonesty and Lawyer is obligated to report them.

3. Attorney Alpha was retained by Passenger, a passenger on a bus, who had been injured in a collision between the bus and a truck. Passenger paid Alpha a retainer of \$1,000 and agreed further that Alpha should have a fee of 25% of any recovery before filing suit, 30% of any recovery after suit was filed but before judgment, and 35% of any recovery after trial and judgment. Alpha promptly called the lawyer for the bus company and told him she was representing Passenger and would like to talk about a settlement. Alpha made an appointment to talk to the lawyer for the bus company but did not keep the appointment. Alpha continued to put off talking to the lawyer for the bus company. Meanwhile, Passenger became concerned because she had heard nothing from Alpha. Passenger called Alpha's office but was told Alpha was not in and would not call back. Passenger was told not to worry because Alpha would look after her interests. After ten months had passed, Passenger went to Attorney Beta for advice. Beta advised Passenger that the statute of limitations would run in one week and, with Passenger's consent, immediately filed suit for Passenger. Alpha, upon Passenger's demand, refunded the \$1,000 Passenger had paid.

Is Alpha subject to discipline?

- A. Yes, unless Alpha’s time was completely occupied with work for other clients.
- B. Yes, because Alpha neglected the representation of Passenger.
- C. No, because Passenger’s suit was filed before the statute of limitations ran.
- D. No, because Alpha returned the \$1,000 retainer to Passenger.

4. Plaintiff and Defendant are next-door neighbors and bitter personal enemies. Plaintiff is suing Defendant over an alleged trespass. Each party believes, in good faith, in the correctness of his position. Plaintiff is represented by Attorney Alpha, and Defendant is represented by Attorney Beta. After Plaintiff had retained Alpha, he told Alpha "I do not want you to grant any delays or courtesies to Defendant or his lawyer. I want you to insist on every technicality." Alpha has served Beta with a demand to answer written interrogatories. Beta, because of the illness of his secretary, has asked Alpha for a five-day extension of time within which to answer them.

Is Alpha subject to discipline if she grants Beta's request for a five-day extension?

- A. Yes, because Alpha is acting contrary to her client's instructions.
- B. Yes, unless Alpha first informs Plaintiff of the request and obtains Plaintiff's consent to grant it.
- C. No, unless granting an extension would prejudice Plaintiff's rights.
- D. No, because Beta was not at fault in causing the delay.

5. Attorney filed suit on behalf of Patient for personal injury suffered in connection with a surgery she underwent to remove two tattoos located in a very precarious area. One tattoo depicted Mickey Mouse, the other Donald Duck. She decided to have them removed because she was getting married and they had outgrown their welcome. Because of their location, she sought treatment from Plastic Surgeon, an expert in tattoo removal. Surgeon removed them, but left big scars in their stead. Patient was embarrassed and unhappy because the scars showed through her bikini.

During the litigation process, it was necessary to hire Expert to provide testimony establishing that Surgeon performed the tattoo removal negligently. Expert estimated her fee to be \$2000, including review of medical records, deposition and trial testimony. Patient did not have the money to pay for Expert so Attorney loaned Patient the money to cover Expert's fee. Meanwhile, Patient desired to undergo a subsequent surgery to correct the scars. Attorney loaned her \$1000 for this surgery. Attorney failed to indicate to Patient in writing the terms of the loan.

Is Attorney subject to discipline?

- A. Yes, because Attorney loaned Patient money for the Expert fee.
- B. Yes, because Attorney loaned Patient money for the Expert fee and the subsequent surgery.
- C. Yes, because Attorney loaned Patient money for the subsequent surgery.
- D. No, because Attorney may loan a client money.

6. The Principal of Elementary City School was charged with sexually abusing a first grade boy. After several days of deliberation, the jury finally rendered its verdict in this highly publicized case. The jury's verdict was "not guilty." The Deputy City Attorney in charge of the prosecution stated to a juror as he was leaving the courtroom, "I can't believe that you are so blind. Can't you see that Principal got away with it and will just do it again?"

Is Deputy City Attorney subject to discipline for his remarks?

- A. Yes, if state law prohibited Deputy City Attorney's communication with the juror.
- B. Yes, because there was an ex parte communication between an attorney and a juror.
- C. No, if the comments could be construed as protecting public safety.
- D. No, because the jury had already reached a verdict.