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BAUM
FALL 2009

FINAL EXAMINATION
750-003 ETHICS

This is a three-hour examination. The exam consists of five essay questions and ten multiple choice questions. The essays are worth a total of 150 points, five questions at 30 points each. The multiple choice questions are worth a total of 100 points, ten questions at 10 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 two points; the explanations for each answer option are worth two 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.

FACT PATTERN FOR QUESTIONS ONE AND TWO – The following facts regarding Jordan and Garrett are to be used in answering Questions One and Two set out below.

Jordan applied for admission to the bar six years ago but was denied for failure to prove her good moral character. Her law school certification showed her to be of good moral character but, after she had taken and passed the bar exam, her law school objected to her admission, indicating that she was the subject of investigation stemming from claims of embezzlement of funds from law school student accounts. The law school did not press criminal charges against Jordan but the bar admission committee rejected Jordan's initial application based on the law school's objection and allegation of wrongdoing.

This year, Jordan has reapplied for admission to the bar and has provided evidence of changed circumstances regarding her fitness for admission to the bar. She has presented evidence of participating in a counseling program for gamblers. She has provided information that indicates that she has significant savings and has no financial problems.

While considering her application, the committee held a hearing to review Jordan's employment for the past six years as a legal assistant for a solo practitioner, Garrett, who handles plaintiff's personal injury cases. At the hearing, Jordan's responsibilities with Garrett were described as follows.

In Garrett's law office, Garrett separated his client files into "Garrett files" and "Jordan files." Garrett retained primary responsibility for the "Garrett files" while Jordan had primary day-to-day responsibility for the "Jordan files."

For the "Jordan files," Jordan would meet with clients, prepare drafts of letters, order copies of police reports and medical records, set up doctor's appointments, prepare settlement packages, relay settlement figure counter-offers to insurance adjuster's with Garrett's permission, prepare discovery, perform legal research, and other such tasks. She had primary responsibility for maintaining contact with the "Jordan file" clients, drafting correspondence and taking statements. Jordan also participated in the taking of recorded statements of those clients by insurance adjusters who worked for the defendant insurers. Jordan indicated that, during the recording of client statements by the adjusters, she would sit with the clients and take notes but not ask any questions or make objections. Garrett was generally not present when client statements were taken and may not even have been in the office.

When drafting settlement proposals, Jordan would obtain the client's medical reports, wage loss information, and other relevant information. Based on that information, she would draft a settlement demand letter to the insurance company, which she would give to Garrett along with the supporting documents for his review and signature before sending to the insurance adjuster. When Garrett and Jordan disagreed on the analysis of the amount, Garrett deferred to Jordan's judgment.

Jordan stated that she would generally speak with the insurance adjuster about the settlement of the client's case but the adjuster always knew that she is not a lawyer. She explained that Garrett would establish a minimum settlement amount for each case and note that information on the client's file. When an adjuster would call to discuss settlement, Jordan would reject an insurer's offer if it was below the minimum amount and make a counteroffer. Jordan would ultimately accept any settlement over the minimum amount but said that she had no authority to accept less. Jordan indicated that Garrett had given her the authority to handle the settlement negotiations with the adjuster, with the caveat that Garrett had to approve the final settlement amount before she could formally accept it on the client's behalf.

After a case was settled, Garrett's secretary would prepare a settlement disbursement statement and give it to Garrett along with the release and settlement check. Garrett would discuss the breakdown of the settlement with the client on the phone and make an appointment for the client to come into the office to meet with Jordan and sign the settlement documents. Jordan would review the documents with the client and obtain the client's endorsement on the settlement check.

For the "Jordan files," Jordan would record her hours worked but would not be paid until the case settled, at which time she would be paid for her time up to one-third of the contingency Garrett received on the case. Jordan also did work on the "Garrett files" for which she was paid each week based on her hourly rate multiplied by the number of hours worked on the "Garrett files" that week. Garrett's wife reported that Jordan processed all client settlements for which she received a separate flat fee of \$50 each because Jordan is very good at making sure the clients do not talk Garrett into reducing his attorney's fees.

QUESTION ONE (30 points) (20 minutes)

As a **member of the Committee on Admission to the Bar**, you are to determine if Jordan should be admitted to the bar. **Draft a decision on admission**, including any conditions for admission that you would impose. Justify your decision using relevant authority.

QUESTION TWO (30 points) (20 minutes)

Garrett has approached you as the **well-known legal ethics expert** that you are and has sought your review of his actions in Jordan's employment with his firm. You are to **draft a client letter** to Garrett regarding any possible ethical issues raised by the facts reported above. Discuss your findings thoroughly. Include any recommended solutions or possible consequences for Garrett.

QUESTION THREE (30 points) (20 minutes)

One week before trial is scheduled to start in the client's matter, Client files a complaint with the disciplinary board of the state bar against Attorney, alleging that Attorney has not interviewed key witnesses and that Attorney has not returned Client's phone calls to discuss trial strategy. Attorney does not believe that the witnesses that Client wants interviewed will provide admissible testimony, but is willing to interview them in the time remaining before trial. Attorney further believes that he or she has made reasonable efforts to respond to Client's inquiries and to keep Client informed. Although Client has filed this complaint, Client has not discharged Attorney.

You are a member of the State Bar Ethics Advisory Committee. Draft an ethics opinion answering the following question: Must Attorney seek to withdraw from further representation once Client has filed a Bar complaint against Attorney?

QUESTION FOUR (30 points) (20 minutes)

Lawyer Sam drafted a brief and affidavit that incorporated facts provided by the client, Todd. After discovering that the client had lied, Sam refused to file the documents and has withdrawn from representation of Todd. Todd has demanded that Sam give the brief and affidavit that Sam drafted to Todd's new lawyer.

Sam has consulted you, a legal ethics expert, about the situation. Draft a client letter in which you advise Sam on his obligations to Todd and on the action he should take in response to Todd's demand.

QUESTION FIVE (30 points) (20 minutes)

Botimer is an attorney who served for several years as a tax preparer and tax advisor to Ruth and other members of the Reinking family, including Ruth's son Jan Reinking (Jan) and his wife Janet Reinking (Janet). From 1995 to 2000, he prepared yearly tax returns for Ruth and from 1995 to 2001, he did the same for Jan and Janet.

Botimer assisted Ruth with decisions related to her ownership stake in a nursing home facility, Magnolia. In 1992, Ruth retired from the business but retained ownership of the Magnolia property, leasing the facility back to Jan and Janet. Apparently, Botimer advised Jan and Janet regarding incorporation of Magnolia as a subchapter S corporation, and advised Ruth about creating a so-called " 'consulting business' " as part of an overall tax strategy. Botimer also prepared tax returns for Magnolia.

Botimer also assisted Ruth with business matters related to another care facility run by her other son, James Reinking (James). Alternative Care Corporation (ACC) is a nursing facility incorporated under subchapter S. Ruth guaranteed loans for ACC and secured these loans with her Magnolia real property, but received no stock in ACC. Botimer apparently advised her as to her options regarding ACC, including restructuring the business so that Ruth could both be involved in management of ACC and receive potential tax benefits from reflecting ACC's losses on her own tax returns.

Controversy arose when James would not recognize that Ruth and/or Jan had an ownership stake in ACC. Both brothers disagreed as to the extent of each one's stock ownership. Botimer assisted Jan and Ruth in negotiations with James regarding potential solutions. Botimer did not obtain conflict waivers in the course of his assistance of the various members of the Reinking family. Further, he did not discuss the advantages and disadvantages of joint representation. Botimer did not use a written client engagement agreement or any other method to obtain consent in writing to the conflict.

Ruth, Jan, and Janet decided to close Magnolia and sell the property in August 2000. The proceeds of this sale were to go to the three family members, with Jan and Janet expecting half. Apparently, Botimer also requested that his fees be paid out of these proceeds. Upon the sale, Ruth did not share the proceeds with Jan, Janet, or Botimer. Instead, she used the proceeds to satisfy her loan guarantees to ACC.

In 2002, Botimer terminated his representation of Ruth with a letter stating that “her failure to cooperate with him, refusal to follow his advice and failure to pay for [his] legal services” led to his decision. The letter also informed Ruth that Botimer was sending correspondence to the IRS to inform the agency “that [Ruth's tax] returns do not contain a true record of your taxable income and that you neglected to report gifts made to your son.” Botimer followed through and sent the letter to the IRS informing the agency of Ruth's failure to, contrary to his advice, correctly state her income and pay gift tax. The letter also contained allegations that Ruth illegally invested her grandchildren's trust property.

To resolve disputes stemming from the sale of Magnolia, Jan and Janet sued Ruth, James, and ACC. Botimer cooperated with Jan and Janet's attorney in the lawsuit and provided him with three declarations to use in pretrial proceedings. The declarations detailed background information about Ruth's business affairs related to Magnolia, as well as information about her estate plans. He attached copies of Ruth's tax returns and other documents related to his prior tax preparation work. Botimer also declared information describing Jan and Janet's lease of the Magnolia real property and business transactions with James as tax avoidance tactics. Ruth did not give her consent to these disclosures, and no court ordered this revelation of Ruth's client information.

You are a member of the State Bar Disciplinary Board. Draft the decision of the board regarding Botimer's actions, including full application of the rules to the facts given. Include appropriate sanctions if you determine that any are warranted.

MULTIPLE CHOICE (WITH EXPLANATION) (100 points) (60 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 two points; the explanations for each answer option are worth two 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 represented Husband and Wife in the purchase of a business financed by contributions from their respective separate funds. The business was jointly operated by Husband and Wife after acquisition. After several years, a dispute arose over the management of the business. Husband and Wife sought Attorney's advice, and the matter was settled on the basis of an agreement drawn by Attorney and signed by Husband and Wife. Later, Wife asked Attorney to represent her in litigation against Husband based on the claim that Husband was guilty of fraud and misrepresentation in the negotiations for the prior settlement agreement.

Is it proper for Attorney to represent Wife in this matter?

- A. Yes, if all information relevant to the litigation was received by Attorney in the presence of both Husband and Wife.
- B. Yes, if there is reason to believe Husband misled both Wife and Attorney at the time of the prior agreement.
- C. No, because Attorney had previously acted for both parties in reaching the agreement now in dispute.
- D. No, unless Husband is now represented by independent counsel.

2. Lawyer has represented Client in numerous matters over the course of twenty years. Currently, Lawyer represents Client in connection with a wrongful death suit against Client's former son-in-law. In a highly publicized criminal trial the son-in-law was acquitted of the murder of Client's daughter. This acquittal came despite what many considered to be irrefutable evidence of his guilt. Client has also completed a book detailing his experiences with the criminal justice system as it related to his daughter's murder. Client has not yet found a publisher for the book and Lawyer is serving as Client's agent.

Client approached Lawyer and advised Lawyer that he had exhausted all of his money in his pursuit of the man he believes to be responsible for his daughter's death, namely her former husband. Lawyer suggested Client accept a loan from Lawyer to help him meet expenses until his book is sold and Client receives his first check from the publishing company. Lawyer is convinced Client's book will be a best seller. Lawyer advises Client that the loan, which will be paid back out of the first check from a publishing company, will be interest free. Client agrees to accept the loan and Lawyer drafts the appropriate documents and recommends in writing that Client have them reviewed by an attorney. Client declines review and signs the documents.

Is Lawyer subject to discipline?

- A. Yes, because he entered into a prohibited transaction with a client.
- B. Yes, because he drafted the loan documents himself.
- C. No, if the terms of the loan are fair and reasonable.
- D. No, because Client was desperate when he approached Lawyer.

3. Alpha is a member of the bar in State First and is also licensed as a stockbroker in State Second. In his application for renewal of his stockbroker's license in State Second, Alpha knowingly filed a false financial statement.

Is Alpha subject to discipline in State First for so doing?

- A. Yes, because his actions involve dishonesty or misrepresentation.
- B. Yes, but only if he is first convicted of a criminal offense in State Second.
- C. No, because his action was not in his capacity as an attorney.
- D. No, because his action was not in State First.

4. Attorney Alpha currently represents Builder, a building contractor and the plaintiff in a suit to recover for breach of a contract to build a house. Builder also has pending before the zoning commission a petition to rezone property Builder owns. Builder is represented by Attorney Beta in the zoning matter. Neighbor, who owns property adjoining that of Builder, has asked Alpha to represent Neighbor in opposing Builder's petition for rezoning. Neighbor knows that Alpha represents Builder in the contract action.

Is it proper for Alpha to represent Neighbor in the zoning matter?

- A. Yes, if there is no common issue of law or fact between the two matters.
- B. Yes, because one matter is a judicial proceeding and the other is an administrative proceeding.
- C. No, because Alpha is currently representing Builder in the contract action.
- D. No, if there is a possibility that both matters will be appealed to the same court.

5. Lawyer has been retained to represent Client, who has been charged with possession of narcotics with intent to distribute. Client was pulled over on a routine traffic stop when the investigating officer noticed the smell of marijuana coming from the car. The officer's search of the car revealed a large quantity of marijuana stored in the trunk. Although Client is eighteen years old, Client's mother advised Lawyer that she will pay all of Client's legal fees and has, in fact, already paid Lawyer's required retainer. Client has told both his mother and Lawyer that the marijuana in the car was, in fact, his. He only wishes for Lawyer to arrange for him to be sentenced to the statutory minimum sentences in jurisdiction.

However, at a meeting in Lawyer's office at which Client's mother was not present, Client confided to Lawyer that the drugs were not his, but that they were his brother's. Client knew that if his mother found out that his brother was involved with drugs, it would break her heart. Later that day, Client's mother phoned to speak with Lawyer. Lawyer suggested that Client's mother attempt to convince Client not to plead guilty but to mount a defense to the charges. Client's mother replied that Client had always been trouble and she wishes he were more like his brother. Lawyer then advised Client's mother of what Client had revealed, namely that it was Client's brother who was responsible for the drugs being in the car.

Is Lawyer subject to discipline?

- A. Yes, for violating the duty of confidentiality.
- B. Yes, for allowing someone other than a client to pay the client's legal fees.
- C. Yes, because allowing Client to plead guilty to a crime he had not committed would be perpetrating a fraud on the court.
- D. No, since Client's mother is paying Client's legal fees, she is entitled to know what strategy Lawyer has in mind.

6. Attorney represented Client in a complex business transaction. Attorney's fee agreement provided that Client pay Attorney a \$1,000 refundable retainer, in addition to \$100 per hour for services rendered. Client paid Attorney \$1,000. To date, Attorney has spent a total of 5 hours reviewing Client's case, researching applicable law, and investigating the facts. Settlement negotiations between the parties had recently commenced when suddenly Attorney fell ill. Attorney was rushed to the emergency department whereupon it was discovered that Attorney had suffered a stroke. Attorney was left mentally impaired, with only a slight possibility of improvement over the next couple of years.

Attorney:

- A. May associate with other competent counsel to assist in the negotiations.
- B. Must withdraw from the representation and refund Client \$500.
- C. Must withdraw from the representation and refund Client nothing.
- D. Must withdraw from the representation, but keep Client's retainer in an interest bearing trust fund account since there is a slight possibility that Attorney may recover from the stroke in the distant future.

7. Associate is a newly admitted attorney. Following his admission, Associate began to work as a lawyer in the firm for which he had served as a law clerk for two years. During Associate's second month as a lawyer, Partner called Associate into Partner's office for a review of Associate's billing records. Partner pointed out that Associate was billing forty hours per week. Partner told Associate that Associate was expected to bill a minimum of fifty-five hours every week. Partner said "I think I can help you out here. You're only billing the time you actually spend on each item. A rule of thumb here is to bill for one and a half times the actual time you spend on each entry. If you spend an hour writing a brief, bill for an hour and a half. Our clients never review our bills that closely and they never question any of our time entries." Following Partner's advice, Associate billed sixty hours the following week.

Is Associate subject to discipline?

- A. Yes, for engaging in conduct involving dishonesty, fraud or deceit.
- B. Yes, unless he reports Partner to the appropriate authorities.
- C. No, since the manner of billing is accepted by the firm's clients.
- D. No, because Partner told Associate to change his billing method and Partner has the authority to tell Associate what to do.

8. Attorney was retained to represent Client to pursue a contract claim. After a number of attempts at settlement of the case, Attorney concluded that the case could not be settled and would have to be tried. Attorney did not regard himself as a competent trial lawyer and believed that Client's best interests required the association of competent trial counsel. One week before the trial date, Attorney associated Trier, whom Attorney knew was a competent trial lawyer, to conduct the trial and a day before trial so informed Client. The total fee charged Client was not increased by the association of Trier.

Was it proper for Attorney to associate Trier?

- A. Yes, because Client's best interests required the association of competent trial counsel.
- B. Yes, because Client was informed of the association of Trier.
- C. No, if Client did not consent to the association of Trier.
- D. No, unless Attorney himself attended the trial with Trier.

9. Millionaire Melanie went to her doctor, Doctor, for a routine check-up. Upon physical examination, small lumps were discovered in her left breast. She was referred to a specialist and was subsequently diagnosed with breast cancer that had spread to her lungs. Unfortunately, Melanie had a poor prognosis and she was told that she only had a few months to live. Melanie sought Attorney's services to draft a will, and to file a lawsuit for medical malpractice against Doctor for failing to discover the cancer sooner. Melanie had acquired much wealth in her lifetime, personal and real property included. Because of the complexity of her finances and because of the potential of many lawsuits that could be filed should a dispute arise over the distribution of her wealth, Attorney drafted a special retainer agreement. The agreement provided for a nonrefundable retainer fee of \$2,000, which Melanie paid in cash at her first appointment with Attorney. Additionally, Attorney charged \$100 an hour for services rendered in connection with this matter. Attorney spent 10 hours reviewing Melanie's file, drafting the will, and investigating her medical malpractice claim. Attorney became convinced that she did not have a strong claim for malpractice and that she would not prevail in a lawsuit. The statute of limitations is about to run in the medical malpractice suit, and Attorney wishes to withdraw without filing suit. Melanie insists that Attorney at least file the medical malpractice complaint before withdrawing.

Is it proper for Attorney to withdraw without filing the medical malpractice lawsuit?

- A. No, if Melanie's rights are not adequately protected at the time Attorney withdraws.
- B. No, because Attorney had already accepted a retainer, and had already performed services such as drafting her will.
- C. Yes, because Melanie could always find another attorney to file the suit.
- D. Yes, since Attorney does not believe that Melanie has an adequate claim.

10. Attorney represents Temporary Employment Agency, Inc. in a wrongful termination lawsuit brought by Head Hunter Hal. Hal claimed that he was wrongfully terminated because he allegedly failed to meet his quota repeatedly for the past several months. Attorney sought the employment records from Temporary Employment Agency, Inc. These records included documents that indicated how many temporary employees were placed each month. Attorney discovered that not only did Hal meet his quota, he out-performed the other head hunters at Temporary Employment Agency, Inc. Thus, it is Attorney's belief that the Agency should accept liability and settle with Hal.

Attorney should:

- A. Notify Temporary Employment Agency, Inc. of all options with the recommendation that it settle with Hal, and continue to represent the Agency even if it decides to reject the settlement and pursue litigation.
- B. Notify Temporary Employment Agency, Inc. of all options with the recommendation that it settle with Hal, and withdraw from representation if the Agency decides to reject the settlement and pursue litigation.
- C. Withdraw from representation because Attorney believes that Agency does not have a case.
- D. Settle the case as quickly as possible.