

LEGAL ETHICS
PROFESSOR PAULA COLBY-CLEMENTS
FINAL EXAM SPRING 2014

Question 1. (20 points)

Sue Jones was admitted to the Massachusetts bar in November of 2013. Once licensed, she decided to open her own practice and established an office in Lowell, MA. Sue has been representing clients in the areas of family law and estate planning. The estate planning aspect of her practice is limited to drafting simple wills and pour over trust documents. While Sue has some steady work she is trying to market her practice to increase her client base. She has run small ads in the local church bulletin, has a website, is listed in the yellow pages and, on occasion, she has run small display ads in the local newspaper. Her ads are professional and convey her name, office address, lists her areas of practice as Family Law and Estate Planning. Sue has recently heard that many small businesses are boosting sales through email marketing via Group-Coupons or Deal-Of-The-Day marketing programs. Sue is considering using one of these marketing programs because she would not need to make an investment up front. The vendor merely keeps a percentage of the price of the coupons that are redeemed. Also, it would be a great way to drive volume as the customer who purchases the coupon must redeem it within a certain period of time in order for the vendor to be obligated to honor it. Sue is thinking she will do a Groupon Coupon for a simple will. She normally charges \$500 but has decided to discount it by \$150 if the coupon is redeemed within the next 30 days.

Can Sue market her practice this way? What ethical considerations should attorney Jones be contemplated before engaging in this type of marketing strategy?

Question 2. (20 points)

Mike Gross is a licensed attorney who has been practicing law for 5 years. Attorney Gross was hired to represent a defendant who was charged with operating a motor vehicle while under the influence of alcohol and leaving the scene of an accident after causing personal injury. At the time of the defendant's arrest, the defendant admitted to the arresting officer that she had been driving the car involved in the accident. (The victim identified the car and plate). Notwithstanding that admission, a friend of the defendant came forward as an alibi witness, claiming that the defendant had been with her watching television at the time of the accident. Having done nothing to attempt to suppress his client's statement to the police, and having failed to interview any of the three eyewitnesses to the accident named in the police report, attorney Gross decided to pursue a defense based on alibi and mistaken identification.

On the day of trial, the defendant and her alibi witness went to the Somerville Division of the District Court Department. At attorney Gross's instruction, the defendant answered the first call of the list and requested that the matter be held for second call. Attorney Gross arrived shortly

thereafter and spoke to the victim. From that conversation, he concluded that the victim would probably not be able to identify his client. Because his client and the alibi witness were somewhat similar in appearance, attorney Gross decided to have the alibi witness impersonate the defendant at second call, hoping thereby to confuse the victim and prompt a misidentification at trial. The respondent advised his client to remain in the back of the court room, and told the alibi witness to come forward to the microphone at second call.

The witness complied, and came forward in answer to the second call of the defendant's case. Attorney Gross's client was acquitted at trial.

Discuss the ethical issues raised by Attorney Gross's conduct making sure to note what ethical rules are implicated and whether the rule(s) were violated.

Question 3. (20 Points)

Attorney Penny Poundstone ("Penny") represented a client on a claim for injuries sustained in an automobile accident in September of 2013. In April of 2013, the client decided to terminate Penny's services and retained other counsel. On May 2, 2013, successor counsel sent Penny a letter of discharge signed by the client and requested the client's file. On June 2, 2013, Penny sent successor counsel a letter refusing to provide any file documents until she was reimbursed for her costs in obtaining the client's medical bills and records. Penny also wrote that the client was not pursuing required medical treatment and was uncooperative with her medical providers, creating gaps in her treatment to the detriment of her bodily injury claim.

Penny's letter of June 2, 2013, was also sent to the client's motor vehicle insurer by Penny's secretary, who had been working part-time in her first law office employment for only four months. Penny had not requested that a copy of the letter be sent to the insurer and was not aware that the copy would be sent. The secretary was still being trained on general legal requirements and policies and misunderstood Penny's instructions concerning the letter. When the secretary presented Penny with the letter for her signature Penny simply signed the letter near a "cc" clearly indicating the insurer's name and address. Although the letter contained disparaging comments about the client and her case, the gaps in her medical treatment would be evident in her medical records.

Successor Counsel has filed a complaint with the BBO citing Penny's behavior. What ethical issues has Penny violated and is she subject to discipline? If so, what should the discipline be?

Question 4. (10 Points)

You have represented a married couple for estate planning purposes for years. The husband dies, leaving everything to his wife. Both wills state that upon the death of the second to die, the beneficiary is a local charity. You have seen the wife socially over the years, and it is apparent to you that her capacity is on the wane, although not to the extent that she needs a guardian. She calls to make an appointment for you to draft a new will for her, leaving everything to her new “caregiver”, a 35-year-old man.

What is your ethical duty, if anything?

Question 5. (10 Points)

An attorney resides in a house on a street that has commercial business on its corner. The attorney is personal friends with the owner of the business.

A prospective client meets with the attorney. During their initial meeting and interview, the prospective client explains that he provided certain services to the owner’s business for which the owner has not compensated him. The prospective client has invoiced, called, and written the owner to request payment several times. The prospective client has received no promises or assurances of payment from the owner. The prospective client requests that the attorney represent him on a contingency fee basis whereby the attorney would recover a reasonable and legally permitted percentage of the amount of funds that the owner owes to the prospective client.

Can the attorney represent the client?

MULTIPLE CHOICE

20 Multiple Choice Questions (1 point each)

Question 1.

Attorney Alpha filed a personal injury suit on behalf of Plaintiff against Defendant. Defendant was personally served with process. Alpha knows that Defendant is insured by Insko and that Attorney Beta has been retained by Insko to represent Defendant. No responsive pleading has been filed on behalf of Defendant, and the time for filing expired over ten days ago.

Is Alpha subject to discipline if Alpha proceeds to have a default judgment entered?

- A. Yes, because Alpha knew that Beta had been retained by Insko to represent Defendant.
- B. Yes, because Alpha failed to extend professional courtesy to another lawyer.
- C. No, because Alpha is properly representing her client’s interests.
- D. No, because any judgment will be satisfied by Insko.

Question 2.

Attorney is a candidate in a contested election for judicial office. Her opponent, Judge, is the incumbent and has occupied the bench for many years. The director of the state commission on judicial conduct, upon inquiry by Attorney, erroneously told Attorney that Judge had been reprimanded by the commission for misconduct in office. Attorney, who had confidence in the director, believed him. In fact, Judge had not been reprimanded by the commission; the commission had conducted hearings on Judge's alleged misconduct in office and, by a three to two vote, declined to reprimand Judge.

Decisions of the commission, including reprimands, are not confidential.

Is Attorney subject to discipline for publicly stating that Judge had been reprimanded for misconduct?

- A. Yes, because the official records of the commission would have disclosed the truth.
- B. Yes, because Judge had not been reprimanded.
- C. No, because Attorney reasonably relied on the director's information.
- D. No, because Judge was a candidate in a contested election.

Question 3.

Attorney is a well-known, highly skilled litigator. Attorney's practice is in an area of law in which the trial proceedings are heard by the court without a jury.

In an interview with a prospective client, Attorney said, "I make certain that I give the campaign committee of every candidate for elective judicial office more money than any other lawyer gives, whether it's \$500 or \$5,000. Judges know who helped them get elected." The prospective client did not retain Attorney.

Is Attorney subject to discipline?

- A. Yes, if Attorney's contributions are made without consideration of candidates' merits.
- B. Yes, because Attorney implied that Attorney receives favored treatment by judges.
- C. No, if Attorney's statements were true.
- D. No, because the prospective client did not retain Attorney.

Question 4.

Judge is presiding in a case that has, as its main issue, a complicated point of commercial law. The lawyers have not presented the case to Judge's satisfaction, and Judge believes she needs additional legal advice.

Judge's former partner in law practice, Attorney, is an expert in the field of law that is at issue. Attorney has no interest in the case.

Is it proper for Judge to consult Attorney?

- A. Yes, because Attorney has no interest in the case.
- B. Yes, if Judge believes that Attorney's advice is needed to serve the interests of justice.
- C. No, unless all parties in the case first give their written consent to Judge's consultation with Attorney.
- D. No, unless Judge informs the parties of Attorney's identity and the substance of Attorney's advice, and asks for their responses.

Question 5.

After both parties had completed the presentation of evidence and arguments, Judge took under advisement a case tried in Judge's court without a jury in which Attorney had represented Plaintiff. The case involved a difficult fact issue of causation and a difficult issue of law.

After the case was under advisement for several weeks, Attorney heard rumors that Judge was having difficulty determining the issue of factual causation and was uncertain about the applicable law. Immediately after hearing these rumors, Attorney telephoned Judge, told Judge of the rumors Attorney had heard, and asked if Judge would like to reopen the case for additional evidence and briefing from both parties. Thereafter Judge reopened the case for further testimony and requested supplementary briefs from both parties.

Was it proper for Attorney to communicate with Judge?

- A. Yes, because both parties were given full opportunity to present their views on the issues in the case.
- B. Yes, because Attorney did not make any suggestion as to how Judge should decide the matter.
- C. No, because Attorney communicated with Judge on a pending matter without advising opposing counsel.
- D. No, because Attorney caused Judge to reopen a case that had been taken under advisement.

Question 6.

Trustco, a trust company, entered into the following arrangement with Attorney, a lawyer newly admitted to the bar.

Trustco would provide Attorney with free office space in the building in which Trustco had its offices. If a customer of Trustco contacted Trustco about a will, an officer of Trustco, who is not a lawyer, would advise the customer and help the customer work out the details of the will. The customer would be informed that the necessary documents would be prepared by Trustco's staff. The completed documents would be submitted by an officer of Trustco to the customer for execution.

Attorney, in accordance with a memorandum from Trustco's trust officer detailing the plan, would prepare the necessary documents. Attorney would never meet with the customer and would not charge the customer for these services. Attorney would be free to engage in private practice, subject only to the limitation that Attorney could not accept employment adverse to Trustco.

Is Attorney subject to discipline for entering into the arrangement with Trustco?

- A. Yes, because Attorney is restricting his right to practice.
- B. Yes, because Attorney is aiding Trustco in the practice of law.
- C. No, because Attorney is not charging the customer for his services.
- D. No, because Attorney is not giving advice to Trustco's customers.

Question 7.

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.

Question 8.

Alpha and Beta are members of the bar in the same community but have never practiced together. Beta is a candidate in a contested election for judicial office. Beta is opposed by Delta, another lawyer in the community. Alpha believes Beta is better qualified than Delta for the judiciary and is supporting Beta's candidacy.

Which of the following would be proper for Alpha?

- I. Solicit public endorsements for Beta's candidacy by other attorneys in the community who know Beta, including those who are likely to appear before Beta if Beta becomes a judge.
 - II. Solicit contributions to Beta's campaign committee from other attorneys in the community, including those who are likely to appear before Beta if Beta becomes a judge.
 - III. Publicly oppose the candidacy of Delta.
- A. I only
 - B. I and II, but not III
 - C. I and III, but not II
 - D. I, II, and III

Question 9.

Attorney advertises on the local television station. In the advertisements, a professional actor says:

"Do you need a lawyer? Call Attorney—her telephone number is area code 555-555- 5555. Her fees might be lower than you think."

Attorney approved the prerecorded advertisement and is keeping in her office files a copy of the recording of the actual transmission and a record of when each transmission was made.

Is the advertisement proper?

- A. Yes.
- B. No, unless Attorney's fees are lower than those generally charged in the area where she practices.
- C. No, because she used a professional actor for the television advertisement.
- D. No, if she makes a charge for the initial consultation.

Questions 10 and 11 are based on the following fact situation. Deft, who has been indicted for auto theft, is represented by Attorney. Prosecutor reasonably believes that Deft committed the offense, but, because of Deft's youth, it is in the interest of justice to permit Deft to plead guilty to the lesser offense of "joy-riding" in return for an agreement by Prosecutor to recommend probation. Prosecutor has so advised Attorney, but Attorney told Prosecutor she would not plea bargain and would insist on a jury trial. Attorney informed Deft of Prosecutor's offer and advised Deft not to accept it. Deft followed Attorney's advice. Attorney is a candidate for public office, and Prosecutor suspects that Attorney is insisting on a trial of the case to secure publicity for herself.

Question 10.

Which of the following would be proper for Prosecutor?

- I. Send a member of his staff who is not a lawyer to consult with Deft.
 - II. Move the trial court to dismiss the indictment and accept a new complaint charging the offense of "joy-riding."
 - III. Proceed to trial on the indictment and prosecute the case vigorously.
- A. II only
 - B. III only
 - C. I and II, but not III
 - D. II and III, but not I

Question 11.

Assume for the purposes of this question ONLY that Deft was tried, convicted, and sentenced to prison for two years.

Must Prosecutor report to the disciplinary authority his suspicions about Attorney's conduct of the case?

- A. Yes, because Deft suffered a detriment from Attorney's refusal to plea bargain.
- B. Yes, if Attorney in fact received widespread publicity as a result of the trial.
- C. No, unless Prosecutor has knowledge that Attorney's refusal to plea bargain was due to personal motives.
- D. No, if Attorney zealously and competently represented Deft at the trial.

Question 12.

Driver consulted Attorney and asked Attorney to represent Driver, who was being prosecuted for driving while intoxicated in a jurisdiction in which there is an increased penalty for a second offense. Driver told Attorney that his driver's license had been obtained under an assumed name because his prior license had been suspended for driving while under the influence of alcohol. Driver asked Attorney not to disclose Driver's true name during the course of the representation and told Attorney that, if called as a witness, he would give his assumed name. Attorney informed Driver that, in order properly to defend the case, Attorney must call Driver as a witness.

Attorney called Driver as a witness and, in response to Attorney's question "what is your name?" Driver gave his assumed name and not his true name.

Is Attorney subject to discipline?

- A. Yes, because Attorney knowingly used false testimony.
- B. Yes, if Driver committed a felony when he obtained the driver's license under an assumed name.
- C. No, because Attorney's knowledge of Driver's true name was obtained during the course of representation.
- D. No, unless Driver's true name is an issue in the proceeding.

Question 13.

Attorney represents Client, a plaintiff in a personal injury action. Wit was an eyewitness to the accident. Wit lives about 500 miles distant from the city where the case will be tried. Attorney interviewed Wit and determined that Wit's testimony would be favorable for Client. Wit asked Attorney to pay Wit, in addition to the statutory witness fees while attending the trial, the following:

- I. Reimbursement for actual travel expenses while attending the trial.
- II. Reimbursement for lost wages while present at the trial.
- III. An amount equal to 5% of any recovery in the matter.

If Attorney agrees to pay Wit the above, for which, if any, is Attorney subject to discipline?

- A. III only
- B. II and III, but not I
- C. I, II, and III
- D. Neither I, II, nor III

Question 14.

Judge is a judge of the trial court in City. Judge has served for many years as a director of a charitable organization that maintains a camp for disadvantaged children. The organization has never been involved in litigation. Judge has not received any compensation for her services. The charity has decided to sponsor a public testimonial dinner in Judge's honor. As part of the occasion, the local bar association intends to commission and present to Judge her portrait at a cost of \$4,000.

The money to pay for the portrait will come from a "public testimonial fund" that will be raised by the City Bar Association from contributions of lawyers who are members of the association and who practice in the courts of City.

Is it proper for Judge to accept the gift of the portrait?

- A. Yes, because the gift is incident to a public testimonial for Judge.
- B. Yes, because Judge did not receive compensation for her services to the charitable organization.
- C. No, because the cost of the gift exceeds \$1,000.
- D. No, because the funds for the gift are contributed by lawyers who practice in the courts of City.

Question 15.

Attorney, who had represented Testator for many years, prepared Testator's will and acted as one of the two subscribing witnesses to its execution. The will gave 10% of Testator's estate to Testator's housekeeper, 10% to Testator's son and sole heir, Son, and the residue to charity. Upon Testator's death one year later, Executor, the executor named in the will, asked Attorney to represent him in probating the will and administering the estate. At that time Executor informed Attorney that Son had notified him that he would contest the probate of the will on the grounds that Testator lacked the required mental capacity at the time the will was executed. Attorney believes that Testator was fully competent at all times and will so testify, if called as a witness. The other subscribing witness to Testator's will predeceased Testator.

Is it proper for Attorney to represent Executor in the probate of the will?

- A. Yes, because Attorney is the sole surviving witness to the execution of the will.
- B. Yes, because Attorney's testimony will support the validity of the will.
- C. No, because Attorney will be called to testify on a contested issue of fact.
- D. No, because Attorney will be representing an interest adverse to Testator's heir at law.

Question 16.

Attorney represented Buyer in a real estate transaction. Due to Attorney's negligence in drafting the purchase agreement, Buyer was required to pay for a survey that should have been paid by Seller, the other party to the transaction. Attorney fully disclosed this negligence to Buyer, and Buyer suggested that he would be satisfied if Attorney simply reimbursed Buyer for the entire cost of the survey.

Although Buyer might have recovered additional damages if a malpractice action were filed, Attorney reasonably believed that the proposed settlement was fair to Buyer. Accordingly, in order to forestall a malpractice action, Attorney readily agreed to make the reimbursement. Attorney drafted a settlement agreement, and it was executed by both Attorney and Buyer.

Was Attorney's conduct proper?

- A. Yes, if Attorney advised Buyer in writing that Buyer should seek independent representation before deciding to enter into the settlement agreement.
- B. Yes, because Attorney reasonably believed that the proposed settlement was fair to Buyer.
- C. No, because Attorney settled a case involving liability for malpractice while the matter was still ongoing.
- D. No, unless Buyer was separately represented in negotiating and finalizing the settlement agreement.

Question 17.

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 the extension would prejudice Plaintiff's rights.
- D. No, because Beta was not at fault in causing the delay.

Question 18.

Judge and Attorney were formerly law partners and during their partnership acquired several parcels of real property as co-tenants. After Judge was elected to the trial court in County, she remained a co-tenant with Attorney, but left the management of the properties to Attorney.

Judge's term of office will expire soon and she is opposed for reelection by two members of the bar. Attorney, who has not discussed the matter with Judge, intends to make a substantial contribution to Judge's campaign for reelection.

Judge is one of fifteen judges sitting as trial court judges in County.

Is Attorney subject to discipline if Attorney contributes \$10,000 to Judge's reelection campaign?

- A. Yes, if Attorney frequently represents clients in cases tried in the trial court of County.
- B. Yes, because Judge and Attorney have not discussed the matter of a campaign contribution.
- C. No, if the contribution is made to a campaign committee organized to support Judge's reelection.
- D. No, because Attorney and Judge have a long-standing personal and business relationship.

Question 19.

Witness was subpoenaed to appear and testify at a state legislative committee hearing. Witness retained Attorney to represent her at the hearing. During the hearing, Attorney, reasonably believing that it was in Witness's best interest not to answer, advised Witness not to answer certain questions on the grounds that Witness had a constitutional right not to answer. The committee chairperson directed Witness to answer and cautioned her that refusal to answer was a misdemeanor and that criminal prosecution would be instituted if she did not answer.

Upon Attorney's advice, Witness persisted in her refusal to answer. Witness was subsequently convicted for her refusal to answer.

Is Attorney subject to discipline?

- A. Yes, because his advice to Witness was not legally sound.
- B. Yes, because Witness, in acting on Attorney's advice, committed a crime.
- C. No, if the offense Witness committed did not involve moral turpitude.
- D. No, if Attorney reasonably believed Witness had a legal right to refuse to answer the questions.

Question 20.

Pros, an elected prosecutor in City, plans to run for reelection in six months. Last year two teenage girls were kidnapped from a shopping center and sexually assaulted. The community was in an uproar about the crime and put pressure on Pros to indict and convict the assailant. Four months ago, Deft was arrested and charged with the crimes. The trial is scheduled to begin next week.

Pros met with the police chief last week to review the evidence in the case. At that time, Pros first learned that, before they were interviewed by the detective in charge of sexual assault crimes, the two victims had been tape-recorded discussing the case between themselves in an interview room. Reviewing the tape, Pros realized that the girls' descriptions of the assailant differed significantly in terms of height, weight and hair color. When officially interviewed, however, their descriptions matched almost perfectly.

Deft's appointed counsel was busy handling a large caseload of indigent defendants and neglected to seek access to the prosecution's investigative file. Pros was virtually certain that Deft's counsel was unaware of the tape recording. Given the other evidence in the case, Pros reasonably believed that the girls accurately identified Deft as their assailant. Pros did not reveal the existence of the tape to defense counsel.

Is Pros subject to discipline?

- A. Yes, because the tape raises a legitimate question about the victims' eyewitness identification of Deft as the assailant.
- B. Yes, unless Pros reasonably believed that the girls accurately identified Deft as their assailant.
- C. No, because under the adversary system of criminal justice, it is expected that each party will marshal the evidence best supporting its own position.
- D. No, unless Deft's counsel submitted a request for all mitigating or exculpatory evidence before the start of trial.