

The Law Governing Lawyers
Spring 2006 Final Exam Sample Answer
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Introduction

This was a take-home exam, so a premium was placed on deep issue-spotting and on organization of answers.

I was very curious/nervous about how much time people spent working on the exam. I got 26 responses to my request for estimates. Where I got a range of time, I used the top of end of the estimate, so these numbers may be a little higher than actual (on the other hand, it wouldn't surprise me if students generally underestimated the actual amount of time spent on the exam). Based on this self-selected group, the numbers:

Average time: 11.3 hours. Median time: 11.5 hours. Maximum time: 17 hours. Minimum time: 5 hours.

I wasn't able to do a precise regression to see if additional time improved the grades, but I did observe (among the self-reporting sample) that the least amount of time spent for an honors grade was 10 hours.

There were 6 As, 7 ABs, 26 Bs, 3 BCs, and 2 Cs.

Question 1

Average words: 1,070. Max: 1,200. Min: 610.

This type of organizational structure is typical of Japanese clients. Japanese companies often have "interlocks" where stockholders have overlapping interests in multiple companies. Unfortunately, US law doesn't overlay on these organizational structures very cleanly, creating some significant problems from a rules compliance standpoint.

QIA

If you are not representing Henry and Dharma affirmatively, your principal concern is that they will become unexpected clients anyway. Although *you* don't think they are your clients, *they* might think that they are your clients, and their subjective belief may control. Togstad.

This risk is compounded by the nature of your interaction with Henry and Dharma. Based on the facts, you will be drafting documents that have significant legal implications for them. You will likely be communicating with them. They may ask you questions about the guarantees. Thus, if the situation isn't clarified, Henry and Dharma might very well think that you are advancing their interests against a common adversary (Kontiki).

Therefore, you will want to make sure Henry and Dharma do not think you are representing them. In Henry's case, you're required under Rule 1.13(d) to clarify that you represent the company and not him, but this is good practice with *all* non-clients, not just those governed by Rule 1.13(d). To clarify the situation, typically you would send a no-engagement letter to both Henry and Dharma and advise them to get their own attorneys. Even if they have told you verbally that they do not expect you to represent their interests, you should leave a paper trail. However, you should not be surprised if Henry and Dharma don't get their own counsel. As the facts state, Mojo is running out of money. Because of that, Henry (and perhaps even Dharma) may be strapped for cash.

Some of you also wanted to send no-engagement letters to Kontiki. I think it would be odd to send a no-engagement letter to a clearly adverse party unless there was some other reason to believe that they were confused about the representation.

Even if you send no-engagement letters, your behavior might constitute the practice of law. For example, recall that selecting and preparing documents can constitute the practice of law. Parsons. If so, your actual behavior might override the express disclaimer in the no-engagement letter, in which case you've unintentionally formed an attorney-client relationship. I think this can be avoided in one of two ways. Either you can send Henry and Dharma a "blank" form and tell them to fill it out, or you can prepare a completed form but deliver it with a letter saying that it has been customized to protect Mojo's interests and not theirs. If Henry or Mojo do have questions about the guarantee, you cannot state or imply that your answers are disinterested. Rule 4.3.

Furthermore, despite a no-engagement letter, Henry or Dharma may give you personal financial details as part of structuring the guarantee. This disclosure of confidential information from a co-party might set up an implied fiduciary duty to protect this confidential information. Nemours. Therefore, in addition to disclaiming an attorney-client relationship, you want to avoid receiving information from Henry and Dharma that might be considered confidential. This has a second-order benefit for Henry and Dharma; their disclosures are not protected by the attorney-client privilege, so any information they reveal to you is not protected from future compelled disclosures.

At the same time, because they are not clients, any information you reveal to them about Mojo's circumstances will not be protected by the attorney-client privilege. Therefore, you will want to tell Henry and Dharma as little as possible about Mojo. This creates some odd dynamics in that Henry already has access to Mojo's information, but he may have independent legal obligations to Mojo to keep that information confidential. Therefore, in dealing with Henry, you will need to make sure the communications are clear when you are conversing with him as a representative of Mojo, bound by his duties to Mojo, and when you are communicating with Henry as an individual with interests implicitly adverse to Mojo.

Meanwhile, Dharma may be clamoring for financial information about Mojo so that it can better assess the risk of issuing the guarantee. Any disclosures made to Dharma won't be protected by the attorney-client privilege, so you will want to pick your words carefully.

To recap, if you are not representing Henry and Dharma, you should:

- Clarify your role with Henry
- Send a no-engagement letter and recommend they hire their own attorneys
- Not take any actions that constitute the practice of law for Henry or Dharma
- When communicating with Henry or Dharma, do not state or imply that you're disinterested
- Avoid receipt of confidential information from Henry or Dharma
- Minimize disclosures to Henry or Dharma of information protected by the attorney-client privilege

Q1B

Based on the foregoing, it might make more sense to concurrently represent all three parties (Mojo, Henry, Dharma) adverse to Kontiki. This would reduce the risk of misunderstandings about who you are representing, and such an arrangement would the attorney-client privilege against Kontiki (but not against the co-represented clients).

I think this concurrent representation is governed by Rule 1.7(b), not Rule 1.7(a). With respect to all three clients, there is a common adversary (Kontiki). Further, you do not have clients on both sides of a transaction. For example, it would be unlikely that Mojo would negotiate directly against Henry or Dharma over the terms of the guarantee, because Mojo only cares about getting a guarantee that satisfies Kontiki. Therefore, if Kontiki wants to change the guarantee, it can negotiate directly with Henry or Dharma without involving Mojo.

Furthermore, although the guarantees are zero-sum in the sense that money paid to satisfy the loan from one party won't have to come from another party, there is not an immediate adversity. Therefore, I look at this situation as much closer to representing co-investors in an enterprise than simultaneously representing both the buyer and seller of the asset.

A number of you pointed out that Henry and Dharma have different levels of adversity. Henry's interests are highly aligned with Mojo's because Henry owns so much of Mojo's stock. In contrast, Dharma has no direct interest in Mojo's financial fate. Based on the facts given, Dharma's only tie to Mojo is that it has a common majority stockholder (Henry). Though Dharma's guarantee may benefit Henry's interests, it does not appear to have any obvious benefit to Dharma. This may make Dharma's guarantee unwise or more likely to violate fiduciary duties to the minority stockholders, but I don't think it increases the direct adversity between Mojo and Dharma.

Instead, I think all three representations create Rule 1.7(b) conflicts in that your representation of each client will be materially limited by your duties to your other concurrent clients. An example will illustrate the point. The guarantee could be structured two ways: (1) all guarantors are jointly and severally liable for Mojo's debts, so Kontiki can go after the guarantors in the order of its choosing, or (2) with an order of priority among the guarantors, where Kontiki must first exhaust the assets of Guarantor A before it can seek recourse against any assets of Guarantor B. Because of these two options, the lawyer with concurrent representations is caught in the

middle. The lawyer can't advise one client to seek a different order of priority because doing so will affect the interests of another client.

Therefore, Rule 1.7(b) waivers are required. In the waivers, you should make the following disclosures:

- You can't be as zealous as normal because you're balancing competing client interests
- The parties will not have the attorney-client privilege amongst each other
- If the parties' interests directly conflict, you may have to withdraw from representing all parties. For example, if Henry reveals some personal information to you that he doesn't want disclosed to Mojo, Dharma or Kontiki (say, his future plans), then you may need to withdraw from the representation.
- In Dharma's case, you may need to clarify that Dharma may have duties to protect its minority stockholders' interests

Other waivers may be required. You may need a Rule 1.8(b) waiver if you may use one party's confidential information to the disadvantage of another client. For example, you might learn financial information about one client that affects the advice you would give to another client, such as that the one client's guarantee is worth little and therefore the other client should change its guarantee. In this case, Rule 1.8(b) may be implicated.

Also, if you are representing all three clients but only Mojo is paying the legal bills, then you'll need a Rule 1.8(f) waiver.

Therefore, if you represent Mojo, Henry and Dharma concurrently, you should:

- Enter into separate engagement letters with each. In Mojo's case, someone other than Henry should sign (Rule 1.13(e))
- Get the Rule 1.7(b) waivers with the appropriate disclosures, and as necessary get the Rule 1.8(b) and Rule 1.8(f) waivers
- Do not play favorites among clients. Even if the real party in interest is Mojo, you need to treat Henry and Dharma as your clients and fulfill all of your duties as an attorney to them
- Build appropriate protocols to consider and protect the interests of the minority stockholders in both Mojo and Dharma.

Because of the risks of confusion, I would prefer to do one of the following two things:

- represent only Mojo and have Henry and Dharma retain their own counsel, or
- represent Mojo, Henry and Dharma concurrently with adequate waivers. When I was confronted with this situation, I ended up choosing this course of action because (a) I couldn't convince Henry and Dharma to get their own counsel (mostly because of cost), (b) they needed counsel to understand what they were doing, and (c) additional counsel would have made a complex deal even more complex.

Question 2

Average words: 1,010. Max: 1,199. Min: 403.

What Must You Do?

First, you must clarify who your client is. The facts state that your client is Excel. You don't represent Vijay or Diane. You may need to clarify this situation for them (Rule 1.13(d)). In particular, to the extent that Diane might be asking questions about her personal situation, you need to avoid a conversation that would create the impression that you are giving her advice on her personal situation. At minimum, I would encourage Diane to get advice from her tax advisor so that she understands the transaction's implications for her personal taxes.

With respect to your client Excel, you must fulfill your competence duties (competence, communication, diligence). Rules 1.1, 1.3, 1.4. This may require you to do extra research (see *Smith v. Lucas*), which it appears you have done. You must also explain the matter adequately to permit the client to make an informed decision (Rule 1.4(b)). It appears you have done that as well.

In general, you must abide by the client's directions regarding the objective. Rule 1.2(a). However, this obligation has limits. Here, the facts state that you have concluded that the \$80,000 needs to be reported as taxable income. As a result, you can't really argue legitimately that you lack "knowledge" about the facts or the law. You've reached your conclusion, you've rendered your advice, and now you have to take responsibility for your conclusion.

Therefore, at this point, you may be barred from following your client's directions. Indeed, you may be required to stop your client from proceeding.

Rule 1.2(d) permits you to counsel your client about the line between legal and illegal behavior. So long as it's just talk, you can talk with Vijay about the options—including why characterizing the \$80,000 payment as return of capital is not, in your opinion, legal. But I think misreporting taxes is fraudulent and probably criminal. Therefore, when Vijay orders you to proceed with behavior you've concluded isn't legal, then Rule 1.2(d) requires that you do not help with that transaction. This result may also be compelled by the catchall Rule 8.4(c) prohibition on conduct involving fraud, misrepresentation, etc.

Furthermore, under Rule 1.13, you are required to proceed in the best interests of the company. Among other concerns, you may be worried that (a) Vijay is not acting in the best interests of the company by pursuing an improvident route, and (b) he may be pursuing that route based on inappropriate motivations, such as personal friendship. This may require you to escalate this matter "up the ladder." Because Vijay is CEO, the only place left to go is to the board of directors. As a practical matter, this isn't as scary as it sounds, as the stock repurchase will require board approval anyway. However, at the applicable board meeting, you may need to say that Vijay is making ill-advised choices. This will not be a pleasant conversation.

Under Rule 1.16(a)(1), you are required to withdraw from the representation if the representation will violate the law. If you were outside counsel, this would require you to stop work on this

matter; and if this were the only matter you were handling for Excel, you would need to “fire” Excel. As inside counsel, I think you can steer away from this work and continue to handle other matters for Excel.

While you may not be required to quit your job, you may be permitted to withdraw from the representation based on various sections of Rule 1.16(b).

But even if you don’t work on the matter, you may have affirmative duties to whistleblow on your client. Rule 1.6(b) requires this if you believe that revealing information is necessary to prevent the crime/fraud that will cause substantial financial injury of another.

Here, the “another” could be Diane, who may be unexpectedly on the hook for big taxes. Or, the “another” could be the taxman who didn’t get its share. Some of you argued that failing to pay taxes on \$80,000 would not substantially injure the taxman. This is a colorable argument, but not one that I would want to defend!

Even if you take the position that Rule 1.6(b) does not require a whistleblow, you may still be required to whistleblow under Rule 4.1. Rule 4.1(b) says that you cannot fail to disclose a material fact to a third party when necessary to avoid a crime/fraud unless disclosure is prohibited by Rule 1.6. Recall that Rule 1.6 allows disclosures under both Rule 1.6(b) (which makes the disclosure mandatory in applicable cases) and Rule 1.6(c). Therefore, if Excel files a fraudulent tax return with your help and you know about it, you may be required to whistleblow under Rule 4.1(b) (incorporating by reference Rule 1.6(c)(1), which permits disclosure to rectify past fraud).

Finally, Lucy’s conversation with Vijay may raise a duty to rat under Rule 8.3. First, Lucy’s conversation with Vijay may have violated Rule 4.2 if she knew Excel had in-house counsel. Note, however, that in practice Rule 4.2 does not necessarily prevent a client from seeking a “second opinion,” which might accurately describe Lucy’s guidance to Vijay. Further, I’m not sure that a violation of Rule 4.2 raises enough question about Lucy’s fitness to be a lawyer to require disclosure under Rule 8.3. (Although, to be clear, her conversation was very harmful to your relationship with Excel because it represented a type of “race to the bottom” legal advice).

Second, and perhaps more importantly, Lucy took the position that the characterization might be permissible because it would be undetectable even if audited. This advice might violate Rule 1.2(d), or it might independently raise questions about Lucy’s ethics regardless of the applicable rules. Therefore, this portion of her advice might give rise to a duty to rat, even if the Rule 4.2 violation does not.

What Would I Prefer to Do?

I would prefer to do the following:

1) I would prefer to retain a tax expert to advise on this matter instead of relying on my own expertise or Lucy’s backdoor advice. In particular, Lucy’s advice was not credible because she may have had incentives to tell Vijay what he wanted to hear—either because of her personal

friendship with Vijay, or as part of a “race to the bottom” where she is relaxing legal standards as part of a marketing effort (i.e., bring your business to us and we’ll say “yes” to your every request).

However, expert advice does not come cheaply. Tax advice can be notoriously expensive, especially if the legal question is fundamentally irresolute. As a result, at some point it might be cheaper for Excel to just give Diane extra compensation to cover the taxes than to spend tens of thousands of dollars to get a more accurate legal answer from a tax expert. So while getting advice from a tax expert sounds good in theory, it may not be practical.

2) If I reject Vijay’s order, Diane will be upset, Vijay will be upset and I will have to defend why I reached a different result than Lucy did. As a result, I would prefer to make Diane and Vijay happy by just acceding to Vijay’s characterization.

However, this decision has an adverse consequence. Schiltz predicts that I will become unethical and a liar. By changing my professional judgment because different advice has a more favorable personal cost/benefit calculus, I will be sacrificing my professional integrity. If I’m willing to change my advice here, when won’t I be willing to change my advice in the future? This type of flexibility ultimately has no natural limits, so once I make a decision like this, it will just be that much easier to bend my professional judgment in the future.

I thought it was interesting how many of you (at least 1/3) were able to rationalize your way through each applicable Rule to conclude that you could do Vijay’s bidding. Does this reinforce Schiltz’s prediction that, once you’re a lawyer, you’ll do what is expedient rather than what you think is right?

3) I would be very upset that my boss Vijay went behind my back to get another opinion. This implicitly shows that Vijay does not trust my advice, and that does not bode well for our future working relationship. As a result, I would prefer to (a) discuss the matter with Vijay and express my concern about the relationship, or (b) exit the relationship because my ability to do my job effectively in the future has been severely compromised.

However, exiting the relationship has some downsides. I will be giving up my job, my social relationships, my status and my income—for what? The remote possibility that this issue will ever surface?

4) I would prefer not to rat out Lucy. The obligation is colorable and there is zero personal upside to getting involved. At the same time, if Lucy never gets any feedback, she may never learn the extent to which her conversation with Vijay was harmful.

What I Actually Did

(This question is based on my real-life experience at Epinions, with the facts liberally embellished.)

As lawyers, we serve as “gatekeepers” exactly for situations like this, and sometimes you need to exercise that gatekeeper role even if it involves personal sacrifice. Otherwise, people can get hurt.

Therefore, in this situation, I refused to sign any of the paperwork associated with the transaction. As a practical consequence, my refusal made it very difficult to proceed. I didn’t enjoy putting my foot down, but I may face personal legal consequences for signing documents on behalf of the company, and I was not prepared to accept those consequences. And as I’ve said in class, I never want to mess with the taxman!

When I refused to sign the paperwork, this sent a strong signal to my boss about my beliefs. In the end, we made a different arrangement for our employee.

At the same time, this situation was the “last straw” in my mounting dissatisfaction with my duties as an in-house counsel. This experience was my epiphany that I would be better suited for a role as outside counsel (where I would not face these personal dynamics) or, better yet, as a law professor—a decision that, I think, has proven to be the right one for me!

Question 3

Average words: 352. Max: 400. Min: 186.

The answer to the question might be “yes” *if* BB has agreed with the client that BB can bill in this fashion. Otherwise, the answer is “no.”

The core problem is that the bill says Jane performed 40 hours of work for Halcyon, but she didn’t. This is a false statement, just like Lawrence’s false statements (in *In re Lawrence*) reporting that he worked 15 hours for the client when he really only worked 1.

Some of you also pointed out that the bill suggests that Jane charges \$250/hour, when in fact this billing rate is really a blend of her rate and Kelly’s rate. This creates another falsity in that Halcyon might now (reasonably) expect Jane’s future hours to be billed at the lower rate.

But what are the legal effects of these falsities? I start my legal analysis with standard contract law. What is the basic business deal with the client? If the contract says that this form of billing is impermissible, then clearly BB cannot do so. In that case, BB is not only breaching the contract, but BB is misrepresenting the facts in its bill. Accordingly, at minimum, such statements violate the catchall Rule 8.4(c) restriction on misrepresentation.

But even if the contract permits BB to bill this way, billing in this manner might still violate Rule 8.4(c). Recall that in *In re Lawrence*, the misrecording of time violated Rule 8.4(c) even though the client never saw the bills. So arguably, characterizing Jane’s time in this manner is a misrepresentation even if the client doesn’t care. However, if the client has instructed BB to bill in this manner, it’s hard to argue that BB has made a misrepresentation to the client.

The falsities could also raise issues under Rule 1.5(b), which requires BB to explain how it computes its bills if it has not regularly represented Halcyon. (As I said in class, you should do written engagement letters for all clients that explain your fees, so I think Rule 1.5(b) is an irrelevant minimum standard). If BB has not otherwise explained its billing mechanisms, this invoice certainly doesn't fill that informational gap.

Thus, whether under standard contract law, Rule 8.4(c) or Rule 1.5(b), BB can set up this type of billing structure if it gets consent from Halcyon. This would require BB to disclose its use of summer law clerks. If it has to make that disclosure anyway, it's not entirely clear why this billing arrangement would be beneficial.

Some of you discussed Rule 1.4(b). I don't think that applies here because I don't think a bill is rendering legal advice. Rule 7.1 could apply, but I think most interpretations limit it to advertising-type communications. I don't think Rule 4.1 applies because the bill is communicated between the lawyer and client, not to a "third person."

For what it's worth, this question is based on a question I got from a former student. She said that her firm billed in this manner and that she further thought this type of billing was a standard practice in her legal niche. I would not recommend you follow this "standard"...

Question 4

Average words: 324. Max: 400. Min: 163.

This question was easy, but not as easy as some of you thought it was! I was hoping you would do a little more than just quote Rule 7.3. If all you did was a basic application of Rule 7.3, I didn't penalize you but I didn't reward you either.

(By the way, next time you watch Erin Brockovich, you will probably see it in a new light. As I said in class, being a professor of legal ethics can diminish the enjoyment of watching movies).

Manly can drop by Frank's house under the following circumstances:

- 1) If Frank initiates the contact. Frank might do so in response to general advertising by Manly, a targeted mail that Manly sends to Frank consistent with Rule 7.3(a), or at Judy's prodding.
- 2) In the limited circumstances contemplated by Rule 7.3, such as if Frank is a close friend or relative or a former client. Even then, Manly may not do so under the circumstances prohibited in Rule 7.3(d).

Note that Rule 7.3(c)(1) permits the contact if Manly reasonably believes that Frank is a client. Thus, Manly could also stop by if Manly has formed (or perhaps even is working towards forming) a class.

- 3) Unless prohibited by Rule 4.2, Manly could drop by Frank's house if Manly thought Frank was a fact witness for purposes of interviewing Frank. While Manly may not be permitted to

initiate discussion about representing Frank, such a conversation may be a natural outgrowth of that meeting as Frank realizes that he may have legal rights.

Otherwise, Manly may not drop by Frank's house to try to get Frank's business. In this respect, notice that Judy's recommendation is worthless as a door-opener. In fact, the rules set up a dilemma for Manly. Judy may want Manly to secure Frank as a client (to spread costs or to increase the defendant's overall damage calculation in a settlement), or she may feel that her recommendation was a personal favor to Manly. In either case, Manly may not be able to do what Judy wants, creating the risk of a disappointed client.