REMINDER: LAW SCHOOL HONOR CODE

The School of Law's Honor Code applies to this examination and all work done in this course. The Honor Code prohibits plagiarism (regardless of intent to deceive, misrepresent, or gain unfair advantage) and violation of oral or written instructions concerning this examination in order to gain an unfair advantage over other students or under circumstances which a reasonable law student would know was likely to result in unfair advantage.

UNIVERSITY OF MISSOURI SCHOOL OF LAW

PROFESSIONAL RESPONSIBILITY – PROFESSOR DESSEM

Final Examination – December 14, 2015

ESSAY QUESTIONS

INSTRUCTIONS

1. Do not start reading this exam (other than this cover page) until instructed to do so by the proctor. This exam is to be taken using EXAM4 in OPEN LAPTOP mode. This exam has 3 pages.

2. The following two questions will count for approximately two-thirds of your examination grade. You will have two hours to answer these questions.

3. Place your exam number, but not your name, on both your answers and on this sheet.

4. During the exam you are permitted to refer to any written or printed materials. However, you are not to look at materials brought by others, speak with anyone concerning the exam during the exam period, consult materials outside the exam room, attempt to access materials other than your own notes electronically through EXAM4 in OPEN LAPTOP mode, or bring materials into the exam room once the examination has begun.

5. Read the questions carefully, but don’t presume they were written with the intention to trick or mislead. In your answers, presume that the ABA Model Rules of Professional Conduct apply.

6. Electronic devices such as mobile phones should be turned off before the exam begins and during the exam. All backpacks or other containers should be closed and left at the front of the room.

7. Students may leave the exam room as needed to use restroom facilities. Except in case of an emergency, only one person should be out of the room at a time.

8. Turn in your answer sheets, these questions, and any scrap paper at the end of your exam.

________________________
EXAMINATION NUMBER
Question 1

You are a partner in a law firm that consists of 25 attorneys, with 10 partners and 15 associates. For many years, you have done legal work for Corporation, Inc., a manufacturing company with plants and offices throughout the Midwest. Although you have no formal retainer agreement with Corporation, Inc., you have given Corporation’s general counsel formal and informal advice on internal corporate matters every two or three years, and the General Counsel consults only you (her former law school classmate) on such matters.

You have just been approached by the general counsel of Midwest Mills, a local competitor of Corporation, Inc., asking if you would represent Midwest Mills in connection with an investigative subpoena from the United States Department of Justice seeking information concerning possible price-fixing between Midwest Mills, U. S. Foundries, and Corporation, Inc. Midwest Mills is a significantly larger company than is Corporation, Inc. You have social friendships with several executives at Midwest Mills, and you recently hired Shelly Secretary, who had worked as a secretary for Midwest Mills for eight months before coming to your law firm, as a secretary in your law firm’s evening typing pool.

When you casually mention to the general counsel of Corporation, Inc., that you received a short call from Midwest, Corporation’s general counsel states that he’d been “meaning to call you about a matter involving Midwest and the federal government.”

Simultaneously with Midwest Mills’s approach to you, your new law firm partner Ellen Esquire was interviewed by the general counsel of U. S. Foundries, asking if she would represent U. S. Foundries in the federal investigation. The general counsel was both inexperienced and quite nervous in his short interview with Ellen, telling her at the very outset of the interview, “My company is in big trouble because the government has found out that we’ve been meeting with some other companies about pricing.” At this point, Ellen cut off Foundries’ general counsel, saying, “Before you tell me any more, I need to see whether we might be representing anyone else in this matter.” Upon learning of your prior representation of Corporation, Inc., Ellen sends a letter to Foundries’ general counsel, informing him that your firm cannot represent Foundries in this matter.

Your law firm’s ethics counsel has asked you to answer and analyze the following questions.

(1) Can you, personally, represent Midwest Mills in this price-fixing investigation consistent with the Model Rules of Professional Conduct and, if so, under what circumstances and based on what assumptions?

(2) If you cannot represent Midwest Mills in this matter consistent with the Model Rules of Professional Conduct, could others in your firm do so? What steps could your firm take to make it most likely that the firm could represent Midwest even if you could not?
You are a partner in a small law firm and are consulted by Vanya Vice-President, the vice-president of Acme, Inc. Vanya tells you that she is concerned about some hazardous waste that Acme dumped several years ago into the Happy River, a stream that runs alongside Acme’s main manufacturing plant. Although she was able to convince Acme’s president to stop dumping such waste, Vanya was unsuccessful in convincing the president to report that waste to state or federal environmental agencies or itself clean up this past release of hazardous waste. She also is now concerned that Acme is about to begin dumping hazard waste once again.

Vanya tells you that she has consulted you on behalf of Acme and also because she is concerned about her own potential civil and criminal liability. She gives you an original Acme memorandum that describes the chemical composition, volume, and other details of the waste that was dumped into the Happy River.

After your conversation with Vanya, she sends you a letter thanking you for talking with her and stating that she does not wish to talk with you further “about any of this.” In this same letter she asks you to return to her the memorandum that she left with you when you talked, stating in her letter that “this is the only copy of this memorandum that exists.”

(1) What, if anything, should you do about the information that Vanya has given you? Can you reveal this information to others or use it for any purpose?

(2) What should you do with the memorandum that Vanya gave you during your conversation with her?
Question 1

I. Can you, personally, represent Midwest Mills in this price-fixing investigation consistent with the Model Rules of Professional Conduct and, if so, under what circumstances and based on what assumptions?

A. What duties do you owe to Corporation, Inc.?

1. Corporation, Inc. may be a current client.

   a. Corporation’s general counsel asks you every few years to provide advice concerning internal corporate matters.

   b. General counsel does not consult any other lawyers on these matters.

   c. However, you have no retainer with Corporation, Inc.

   d. This work also occurs only every few years.

   e. But see Togstad v. Vesely, Otto, Miller & Keefe (Minn. 1980), p. 286, 290 n. 15: “An attorney-client relationship is created whenever an individual seeks and receives legal advice from an attorney in circumstances in which a reasonable person would rely on such advice.”

   f. Corporation may reasonably consider you to be its lawyer, which makes Corporation a current client.

2. If Corporation, Inc. is a current client, then Rule 1.7 applies.

   a. Rule 1.7(a) provides: “Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if: (1) the representation of one client will be directly adverse to another client; or (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer’s responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.”

   b. Would representation of Midwest be “directly adverse” to Corporation, Inc.?
There is no prohibition against one attorney representing co-defendants in a criminal matter.

However, each company may have interest in testifying against the others in this investigation.

Yet, because investigation involves price-fixing, each company may have to implicate itself to provide useful testimony against another company.

c. Is there a “significant risk that the representation of one or more clients will be materially limited by the lawyer’s responsibilities to another client?”

Your representation of Midwest may be materially limited because of your loyalties to Corporation.

Your representation of Corporation may be materially limited due to your duties to Midwest.

(a) You also may want to obtain greater legal business from Midwest.

(b) You may have client confidences from Corporation due to your prior representation of that company.

d. If concurrent conflict exists pursuant to Rule 1.7(a), might representation still be possible pursuant to Rule 1.7(b)?

(1) All four requirements of Rule 1.7(b) must be met to satisfy Rule 1.7(b).

(2) You may “reasonably believe” that you can “provide competent and diligent representation” to both Midwest and Corporation (Rule 1.7(b)(1)).

(3) There is no indication that “representation is . . . prohibited by law” (Rule 1.7(b)(2)).

(4) The “representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal.” (Rule 1.7(b)(3)).

(5) But it is unlikely that “each affected client [will] give[ ] informed consent, confirmed in writing.” (Rule 1.7(b)(4)).

3. What if Corporation is not a current client?

a. If Corporation, Inc. is not a current client, then it is former client and Rule 1.9 applies.
b. Rule 1.9(a) provides: “A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.”

c. Are Midwest Mills and Corporation, Inc. involved in “same or substantially related matter?”

(1) Probably not, because prior advice had been on internal corporate matters—not dealings with competitor companies.

(2) However, it may be difficult to separate internal from external with respect to these competing companies.

(3) If both companies seek representation concerning government investigation, then matter is the same.

d. Are interests of Midwest Mills “materially adverse” to interests of Corporation, Inc.?

(1) To extent that companies may want to implicate other companies, their interests are materially adverse.

(2) Interests may become materially adverse as investigation proceeds.

e. Statement of Corporation, Inc.’s general counsel may suggest that Corporation will not give “informed consent, confirmed in writing” to representation of Midwest Mills.

B. What duties do you owe to U. S. Foundries?

1. Rule 1.18 makes U. S. Foundries a “prospective client.”

a. Rule 1.18(a) applies to U. S. Foundries: “A person who consults with a lawyer about the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client.”

b. Rule 1.18(b) also applies to U. S. Foundries: “Even when no client-lawyer relationship ensues, a lawyer who has learned information from a prospective client shall not use or reveal that information except as Rule 1.9 would permit with respect to information of a former client [whether or not adverse client is represented].”

c. Rule 1.18(c) prohibits lawyer from representing “a client with interests materially adverse to those of a prospective client in the same or a substantially related
matter if the lawyer received information from the prospective client that could be significantly harmful to that person in the matter, except as provided in paragraph (d).”

(1) Here interests of Midwest Mills are likely to be “materially adverse” to those of U. S. Foundries.

(2) While probably not admissible in evidence, general counsel’s information could be significantly harmful in this matter.

II. If you cannot represent Midwest Mills in this matter consistent with the Model Rules of Professional Conduct, could others in your firm do so? What steps could your firm take to make it most likely that the firm could represent Midwest even if you could not?

A. Is conflict disqualification imputed to entire firm?

1. Rule 1.10(a) provides: “While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7 and 1.9, unless . . . .”

   a. This conflict does not stem from “a personal interest of the disqualified lawyer,” so Rule 1.10(a)(1) exception does not apply.

   b. Nor does conflict arise “out of the disqualified lawyer’s association with a prior firm,” so Rule 1.10(a)(2) exception does not apply.

2. Rule 1.18(c) provides: “If a lawyer is disqualified from representation under this paragraph [because of information received by Ellen Esquire], no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter, except as provided in paragraph (d).”

B. Can conflict be waived?

1. Rule 1.10(c) allows waiver of conflict pursuant to Rule 1.7.

2. Rule 1.7(b)(b) provides that concurrent conflicts can be waived if 4 listed factors exist.

3. Concurrent conflicts of interest can be waived pursuant to 1.7(b) if:

   a. (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affect client (and lawyer may be able to reasonably believe that in this situation);

   b. (2) the representation is not prohibited by law (and there is nothing to indicate such representation is prohibited by law);
c. (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceedings before a tribunal (not yet, but it’s likely that this may occur); and
d. (4) each affected client gives informed consent, confirmed in writing (unlikely to be obtainable in this case).

4. Rule 1.18(d) provides for waiver of conflict with prospective client (U. S. Foundries) if:
   a. (1) “both the affected client [Midwest Mills] and prospective client [U. S. Foundries] have given informed consent, confirmed in writing; or
   b. (2) “the lawyer who received the information took reasonable measures to avoid exposure to more disqualifying information than was reasonably necessary to determine whether to represent the prospective client; and
      (1) (i) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and
      (2) (ii) written notice is promptly given to the prospective client [U. S. Foundries.”]

C. Because she is not an attorney, Shelly Secretary would not disqualify firm from representation of Midwest.

   1. Rule 1.10 conflicts are only imputed from lawyers to firm, not from nonlawyers to firm (Rule 1.10 Comment 4).

   2. However, Shelly must be screened to protect revelation of confidential information.
I. What, if anything, should you do about the information that Vanya has given you? Can you reveal this information to others or use it for any purpose?

A. Rule 1.6(a) provides: “A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

1. Did Vanya become a client during conversation with you?
   a. See Togstad v. Vesely, Otto, Miller & Keefe (Minn. 1980), p. 286, 290 n. 15: “An attorney-client relationship is created whenever an individual seeks and receives legal advice from an attorney in circumstances in which a reasonable person would rely on such advice.”
   b. Because Vanya may reasonably consider you to be her lawyer, Vanya should be considered a client.
   c. If Vanya did not become a client, she at least became a prospective client.
      (1) Rule 1.18(a) provides: “A person who consults with a lawyer about the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client.”
      (2) Rule 1.18(b) provides: “Even when no client-lawyer relationship ensues, a lawyer who has learned information from a prospective client shall not use or reveal that information, except as Rule 1.9 would permit with respect to information of a former client.”

2. Is Acme also a client?
   a. If so, Rule 1.6 protects what Vanya has told you.
   b. If not, there is no need to protect information under Rule 1.6.
   c. Comment 1 to Rule 1.13 of the Model Rules provides: “An organizational client is a legal entity, but it cannot act except through its officers, directors, employees, shareholders and other constituents [in this case, Vanya Vice-President].”

3. Rule 1.13(g) allows lawyer to represent both corporation and individual officer, but this is subject to Rule 1.7 conflicts rule.
   a. Even if there is conflict under Rule 1.7, Rule 1.7(b) waiver should be possible in this case assuming lawyer reasonably believes s/he will be able to provide
competent and diligent representation to both Vanya and Acme, representation is not prohibited by law, representation doesn’t involve assertion of claim by one client against the other (unlikely here, at least at this stage of proceedings), and each client gives informed consent.

b. But Rule 1.13(g) provides that “informed consent” necessary to secure Rule 1.7 waiver must be given by someone other than Vanya on behalf of corporation.

4. Even if Vanya and Acme are no longer your clients, Comment 20 to Rule 1.6 provides: “The duty of confidentiality continues after the client-lawyer relationship has terminated. See Rule 1.9(c)(1) for the prohibition against using such information to the disadvantage of the former client.”

5. No one has given informed consent to permit you to reveal confidences.

6. Nor is there any evidence that disclosure “is impliedly authorized in order to carry out the representation.”

7. Do any of Rule 1.6(b) exceptions apply?

a. Rule 1.6(b)(1): Do you “reasonably believe [it] necessary (1) to prevent reasonably certain death or substantial bodily harm?”

(1) It is reasonable to believe that toxic waste could cause reasonably certain death or substantial bodily harm if revelation does not prevent further waste or lead to clean-up of existing waste.

(2) Comment 6 to Rule 1.6 provides: “Thus, a lawyer who knows that a client has accidentally discharged toxic waste into a town’s water supply may reveal this information to the authorities if there is a present and substantial risk that a person who drinks the water will contract a life-threatening or debilitating disease and the lawyer’s disclosure is necessary to eliminate the threat or reduce the number of victims.”

b. Rule 1.6(b)(2): Do you “reasonably believe [it] necessary to prevent [Acme] from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer’s services.”

(1) It would seem that revelation of information is necessary to prevent Acme “from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests of Acme.

(2) It also would seem that revelation of information is necessary to prevent Acme “from committing a crime or fraud that is reasonably certain to
result in substantial injury to the property” of those whose property will be polluted by hazardous waste.

(3) Although Vanya and Acme are no longer using your services, Rule 1.6(b)(2) extends exception to situations in which “the client has used . . . the lawyer’s services.”

c. Rule 1.6(b)(3): Do you “reasonably believe [it] necessary to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client’s commission of a crime or fraud in furtherance of which the client has used the lawyer’s services?”

(1) This, too, would apply, because “financial interests or property” of others, including Acme, are, or have been, injured by Acme’s commission of a crime due to past release of toxic waste.

(2) Even if injury can’t be prevented, revelation of waste discharge is likely to be necessary to rectify injuries resulting from waste discharge.

d. Rule 1.6(b)(4): Do you “reasonably believe [it] necessary to reveal information “to secure legal advice about the lawyer’s compliance with these Rules?”

(a) It would be good practice for you to consult with bar counsel about what you should do in these circumstances—which will require revealing to bar counsel some confidential information.

e. Rule 1.6(b)(6): Do you “reasonably believe [it] necessary to [reveal information] to comply with other law or a court order?”

(1) Are there laws creating mandatory duty to report public safety issues?

(2) Is there anything analogous to duty to report a body that was used by prosecutor in Belge case?

8. With respect to your representation of Acme, Rule 1.13 (b) and (c) gives lawyer an additional basis on which to reveal and use information.

a. Rule 1.13(b) provides: “If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law that reasonably might be imputed to the organization, and that is likely to result in substantial injury to the organization, then the lawyer shall proceed as is reasonably necessary in the best interest of the organization. Unless the lawyer reasonably believes that it is not necessary in the best interest of the organization to do so, the lawyer shall refer the matter to higher authority in the organization, including, if warranted by the
circumstances, to the highest authority that can act on behalf of the organization as determined by applicable law.”

(1) In this case, lawyer would have duty to refer matter to Acme’s president or board.

(2) It is in best interest of Acme to address this continuing problem.

b. If Acme refuses to act on lawyer’s urging, Rule 1.13(c) would allow lawyer to reveal information to others outside the corporation (such as law enforcement).

(1) This, though, would require that refusal to act is “clearly a violation of law” (Rule 1.13(c)(1)); and

(2) lawyer also believes “that the violation is reasonably certain to result in substantial injury to the organization.”

II. What should you do with the memorandum that Vanya gave you during your conversation with her?

A. Normally, Rule 1.16(d) would require lawyer to return original documents to Vanya (and Acme): “Under termination of representation, a lawyer shall . . . surrender[ ] papers and property to which the client is entitled .”

B. However, in this case, lawyer should be concerned that Vanya or Acme may destroy document.

1. Acme has refused to reveal waste.

2. Vanya is concerned about her own civil and criminal liability and may (reasonably) believe that document implicates her.

3. But document is not only uniquely relevant to liability of Vanya and Acme, but it may be crucial in cleaning up waste and protecting surrounding property and people.

B. If you give memorandum back to Vanya, knowing that she will destroy it, you may violate final sentence of Rule 3.4(a).

1. A reasonable lawyer would be concerned that, if memorandum is returned to Vanya, she will destroy it.

2. Second sentence of Rule 3.4(a) provides: “A lawyer shall not counsel or assist another person to do any such act [such as “destroy or conceal a document or other material having potential evidentiary value”].”
C. Comment 2 to Rule 3.4: “Applicable law in many jurisdictions makes it an offense to destroy material for the purpose of impairing its availability in a pending proceeding or one whose commencement can be foreseen.”

1. Rule 3.4(a) only is violated if access to evidence is unlawfully obstructed—thus there must be separate statute making destruction or concealment of document illegal.

2. Some state statutes require that evidence be turned over even without request from law enforcement.

3. Rule 1.6(b)(6) exception to confidentiality duty exists for revelation of information “to comply with other law or a court order.”

4. Although there is not at present any legal proceeding pending, it is reasonable to presume action(s) will be commenced as soon as document is uncovered (if not before).

5. Civil discovery requests extend to material within possession of party’s attorney, and duty to preserve material (spoliation rules) are triggered whenever future civil litigation is likely.

D. Sarbanes-Oxley provides that “whoever knowingly alters, destroys, mutilates, conceals, covers up, falsifies, or makes a false entry in any record, document, or tangible object with the intent to impede, obstruct, or influence the investigation or proper administration of any matter within the jurisdiction of any department or agency of the United States may be punished by up to 20 years in jail.”

1. Although statute was enacted in response to fiscal fraud cases, this statute was used in Connecticut child pornography case (Problem 11-7).

2. By its terms Sarbanes Oxley applies to Vanya’s memorandum in this case.

E. Could you make a copy of memorandum (to preserve it) and return document to Vanya with letter asking her to provide it to government officials?